

# Models of Quality for Third Parties in Alternative Dispute Resolution

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## I. INTRODUCTION

Alternative dispute resolution (ADR) has become a popular and accepted part of the national and international legal systems.<sup>1</sup> In the United States, ADR encompasses both private mechanisms and court-attached procedures used for resolving disputes.<sup>2</sup> In international commerce, the

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<sup>1</sup> One indication of popularity is the number of persons offering to serve as third parties in ADR proceedings. A vivid illustration of the growth in popularity using this standard of measurement is the publication of MARTINDALE-HUBBELL, DISPUTE RESOLUTION DIRECTORY (1994). See also Laura Duncan, *Ethics Standards for Mediation Field Taking Shape*, CHICAGO DAILY L. BULL., March 30, 1994, at 1 ("In the early 1980s, there were just a handful of private mediation firms nationwide, compared with some 800 companies doing business today."). But see Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55, 61 (noting that "[w]hile some growth of ADR seems assured, the acceptance that is the key to its expansion is less so.").

<sup>2</sup> This article does not address specifically the merits of court-attached ADR. See generally Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993). On the relationship of ADR to litigation and settlement of litigation, see Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 265 (1995); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); SUSAN KEILITZ, NATIONAL CENTER FOR STATE COURTS, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (1994); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'*, 19 FLA. ST. U. L. REV. 1 (1991). For an interesting analysis of the influence of ADR on the legal system and lawyers, see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

One explanation for the acceptance of ADR as an alternative to court adjudication is suggested in Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808,

alternative to litigation generally takes the form of arbitration, and it is an integral part of business transacted across national borders.<sup>3</sup> There are a variety of procedures included within the ADR label,<sup>4</sup> and each procedure provides a role for a third party (TP)<sup>5</sup> in the effort to resolve the dispute.<sup>6</sup>

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1824-1825 (1986). Alschuler identifies the complexity of procedures in litigation as a partial cause of court delay and argues, "Customary American trial procedures are plainly unworkable in small-stakes cases . . . . [I]f the truth be told, American trial procedures are not very serviceable for mid-stakes cases either." *Id.* at 1825. ADR procedures became part of the litigation process formally in many jurisdictions after the passage of the Civil Justice Reform Act in 1990. *See also* Resnick, *supra*, at 265 (describing ADR as a movement by which "[t]he focus is shifting from adjudication to resolution"). *See generally* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

<sup>3</sup> The term "ADR" is not always used to refer to international commercial arbitration, but here I use the term in its broadest sense, as meaning all forms of dispute resolution offered in place of litigation, where a third party participates in the procedure. *See* ELIZABETH ROLPH ET AL., *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* 2 (1994) [hereinafter *ESCAPING THE COURTHOUSE*] ("For the purposes of this inquiry, we define *private ADR* as any dispute resolution service provided for a fee by a third-party neutral outside the court system."). Although arbitration is the preferred method for international dispute resolution, other methods sometimes are also used. *See, e.g.*, Philip Naughton, *Letter from London: ADR Begins to Find its Place in Britain*, 10 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 86 (1992); Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637 (1995); Jan Paulsson, *Fast-Track Arbitration in Europe (With Special Reference to the WIPO Expedited Arbitration Rules)*, 18 HASTINGS INT'L & COMP. L. REV. 713, 715 (1995) (describing WIPO Expedited Arbitration as "offering the international community a choice between two systems of arbitration"); *see also* *Commercial Arbitration and Mediation Center for the Americas Founded to Resolve NAFTA Private International Commercial Cross-Border Disputes*, 7 WORLD ARB. AND MEDIATION REP. 7 (1996).

<sup>4</sup> *See* Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions in Dispute Resolution as Stakes in a Professional Competition About the 'Rules of the Game'*, 21 L. & SOC. INQUIRY 285 (1996) [hereinafter *Dezalay & Garth, Fussing About the Forum*]; Robert A. Baruch Bush, *DEFINING QUALITY IN DISPUTE RESOLUTION: TAXONOMIES AND ANTI-TAXONOMIES OF QUALITY ARGUMENTS* 14-19 (1988).

<sup>5</sup> I use the abbreviation "TP" instead of another term because other terms either involve association with one ADR method or another, as with arbitrator or mediator, or imply the issues to be discussed in this article, as when the term "neutral" is used.

<sup>6</sup> Negotiation by disputants without the participation of a TP sometimes is also considered part of ADR. *See* STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 3 (1992) ("The most common form of dispute resolution is negotiation. Compared to processes using 'third parties,' negotiation has the advantage of allowing the parties themselves to control the process and the solution."). The authors list seven kinds of proceedings in which a third party

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In arbitration the role of TP is played by the arbitrator(s), in mediation by the mediator and in early neutral evaluation by the evaluator, just as in court the role is played by the judge.

As ADR has gained acceptance and use in the United States, increased attention has been focused on the qualities of TPs. The quality of the arbitrator has consistently been acknowledged as being the single most important determinant of quality in arbitration; similarly, less directive TPs in facilitative procedures, such as mediation, also play a pivotal role in the success of the process.<sup>7</sup> Identifying the "best" qualities for TPs is currently under discussion as organizations within and outside of government attempt to regulate TPs to ensure fairness and competence.<sup>8</sup> Concern has been expressed about the need for training and substantive expertise, the sorts of

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is used.

<sup>7</sup> See Katie Brown, *Retreat from Courtroom Battles Made Phillips Mediation Pioneer*, S.F. BUS. TIMES, May 30, 1988, at 12 ("Mediation is only as good as the quality of your mediator.") (quoting San Francisco attorney Randy Wulff); Alfred Knoll, *Commentary: Testing ADR*, RECORDER, Apr. 3, 1995, at 8 (reporting that judicial quality was the principal public concern articulated in the report of the California State Judicial Council on the judicial system); Stephen R. Bond, *The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration*, in ICC, *THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS* 9 (ICC Publishing, S.A. ed., 1991) [hereinafter *Experience of the ICC*] ("Everyone is familiar with the expression that 'an arbitration is only as good as the arbitrator.'").

<sup>8</sup> See *Symposium: Certification of Mediators in California*, 30 U.S.F. L. REV. 609 (1996). ADR has been criticized on grounds of fairness by scholars, described generally in Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55; by observers, see Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, § 1, at 37; and, in particular circumstances, even by ADR industry participants, see *JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. AND MEDIATION REP. 50-51 (1995). For a general criticism of ADR and its impact on the justice system, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

Indications of interest in regulating standards of conduct for ADR third parties include John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 95-98 [hereinafter *Standards of Professional Conduct*]; Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989); *Experience of the ICC*, *supra* note 7, at 9; *Joint AAA/ABA/SPIDR Committee Issues Draft Standards of Conduct for Mediators*, 5 WORLD ARB. AND MEDIATION REP. 207 (1994); *CPR Forms Ethics Group*, 13 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 14 (1995). See Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-546 (1986) (considering the importance of the issue of qualities of TPs with regard to the impact on the justice system).

conflicts of interest likely to exert influence on TPs, appropriate standards of disclosure and the role—with respect to these issues—of different forms of organizations offering TP services.<sup>9</sup> This attention to the needs and characteristics of TPs and ADR has been frustrated by the absence of information about the market in ADR services, resulting in part from the confidentiality surrounding most ADR activities. Secrecy has exacerbated the effort to determine how best to regulate TPs, or whether regulation is even necessary.<sup>10</sup>

This Article will consider the general question of what a “good” TP looks like; that is, what qualities are necessary for a TP to be acceptable to the parties and effective generally in resolving disputes.<sup>11</sup> There are at least two reasons to address this issue. First, TPs are in a unique position. They are not advocates, so attorney regulations are not entirely relevant, yet they are also distinct from judges, both in their function in some instances and in the influences exerted upon them because of the nature of the market for disputing services.<sup>12</sup> New models must be generated to position TPs in

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<sup>9</sup> Other issues have also been raised in recent discussions about regulating ADR, including fee structures and the role of ADR service provider firms. *See Standards of Professional Conduct*, *supra* note 8, at 97; *CPR Forms Ethics Group*, 13 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 14 (1995) (noting that the CPR ethics group will “look at issues of accountability, quality, conflicts of interest, access, and blurring of public-private functions” regarding organizations that provide ADR services on a large scale).

<sup>10</sup> There have been a variety of efforts to collect information; two of the principal sponsors of such efforts are the Rand Institute for Civil Justice, which published *ESCAPING THE COURTHOUSE* (1994), as well as Elizabeth Rolph & Erik Moller, *EVALUATING AGENCY ALTERNATIVE DISPUTE RESOLUTION PROGRAMS* (1995) and the University of Wisconsin Dispute Processing Research Program. *See also* SUSAN SCOTT, *CPR INSTITUTE FOR DISPUTE RESOLUTION, LAW FIRM PRACTICES IN ADR: SURVEY FINDINGS* (1995).

<sup>11</sup> I will consider this question for all TPs, regardless of the method of dispute resolution selected, because I believe that the issue has importance as a general matter in the context of a substitute for litigation; if a difference in proceedings and consequent roles is relevant to the inquiry, it will be recognized in the analysis.

<sup>12</sup> The TP’s role resembles the judge’s with regard to the influence exerted over the parties. Even in mediation, the TP can and often does influence the parties in spite of his facilitative role. *See* Dezalay & Garth, *Fussing About the Forum*, *supra* note 4. The responsibility of a judge resulting from his power over the rights and interests of others is described by Alschuler:

[W]hen a business executive . . . gives short shrift to an argument about how to respond to a competitor’s marketing initiative . . . the person who advanced the argument may reply, ‘It’s your company,’ . . . . When, however, a judge gives short shrift to Farmer Brown’s claim that he owns the colt, the judge does not make a decision about ‘his’

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appropriate contexts, but because of the combination of scarcity of information and fierce competition for business among TPs and hopeful TPs, the models offered thus far have been grounded more upon advocacy than upon observation.<sup>13</sup> That is to say, the models tend to be offered by partisans with an academic and even economic interest in promoting a particular model that fits their own position.

Second, governmental and other organizations in the United States are regulating ADR and TPs,<sup>14</sup> but the common regulatory approach is

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company . . . . He makes a decision about Farmer Brown's rights. Decisions ordinarily are the province of the parties most affected by them. Adjudication, however, differs from ordinary decision making in entrusting a choice to a person who is not affected by it, a person who has *special obligations* to those whose interests are at stake.

Alschuler, *supra* note 2, at 1844 (emphasis added). TPs are similarly responsible to disputants, even if their role is not adjudicative, because their conduct influences the outcome of the proceedings. See generally Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 60 (1988) ("One way to make private justice acceptable to the system of public justice is, of course, to have it approximate the public system's own standards."). Similarly, the acceptability of TPs in ADR may be based in part on their comparability to public judges.

On the appropriateness of and parameters for lawyers acting as TPs generally, see Leonard L. Riskin, *Toward New Standards for The Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Note, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213 (1993). For a discussion of the unique role of mediators, see Robert D. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model*, 13 MEDIATION Q. 131 (1995). See Carrie Menkel-Meadow, *Conflicts and Mediation Practice*, DISP. RESOL., Spring 1996, at 5 (commenting on the limitations of analogizing to lawyer conflict of interest rules for conflicts involving TPs).

<sup>13</sup> Professor Robert A. Baruch Bush offers an example of this position, in urging that one "conception of the mediation process and the mediator's role" should be adopted as the basis for determining uniform standards for mediators. See Bush, *supra* note 8, at 257. See also Knoll, *supra* note 7, at 8; Peter S. Caldwell, *The Training of Arbitrators and Quality Assurance of Arbitration*, 9 J. INT'L ARB. 99 (1992).

<sup>14</sup> See generally *Current Trends in Neutral Qualifications*, 5 WORLD ARB. AND MEDIATION REP. 13, 13-22 (1994); *Standards of Conduct for Mediators*, reprinted in 5 WORLD ARB. AND MEDIATION REP. 223, 223-225 (1994) (prepared by a joint committee of the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution); *CPR Forms Ethics Group*, 13 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 14 (1995); Charles Guittard, *Mediation for Mediators*, TEX. LAW., Dec. 19, 1994, at 16 ("Mediators must come together in a 'quality' collaboration to address the need to ensure quality mediator services . . . [T]here is little disagreement about the need for broad-based measures to protect the public from substandard mediators."); Tom

formalistic at best; mediators are subject to one set of regulations,<sup>15</sup>

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McDonald, *Finding a Win-Win Solution*, TEX. LAW., Mar. 4, 1996, at 15 (competition between lawyers and non-lawyer mediators); *New York Court Panel Proposes Expanded ADR*, 7 WORLD ARB. AND MEDIATION REP. 7 (1996) (panel recommends "training protocols for neutrals" who work in court-attached ADR).

Education programs for TPs have proliferated. See, e.g., *UMass Boston Offers Masters in Dispute Resolution, Highlighting a Growing Trend*, 6 WORLD ARB. AND MEDIATION REP. 72 (1995). Furthermore, efforts are increasing to restrict entry to TP work to those with particular training. Some of these efforts can be seen as attempts to control the market by lawyers. See, e.g., *Broad Reforms Envisioned for Securities Arbitration*, 5 WORLD ARB. AND MEDIATION REP. 252, 252-254 (1994) (discussing a proposed amendment to the Uniform Code of Arbitration to prohibit participation in securities arbitrations by most non-lawyers); *New ADR Referrals Only for Attorneys*, MASS. LAW., July 17, 1995, at 1. Other efforts are aimed more at skills training in ADR methodology. See Fraser Hubbard, *Arbitration, Mediation Becoming Popular Alternatives to Litigation*, 9 WARFIELD'S BUS. REC., Nov. 18, 1994, at 9. Hubbard comments:

[E]ffective legal representation in Maryland requires knowledge and skills regarding when to decide to use ADR and how best to use it. These skills involve the subtle arts of negotiation and the practical requirements of ADR, subjects now fixtures in law school curricula nationally and in local continuing legal education efforts sponsored by state bar associations.

*Id.* See also *Standards of Professional Conduct*, *supra* note 8, at 115-117 (statement of Professor Kimberlee Kovach); William Hathaway, *A New Way of Viewing Dispute Resolution Training*, 13 MEDIATION Q. 37 (1995).

<sup>15</sup> FLA. R. CERT. & CT.-APP'T. MEDIATORS R. 10.010-10.290 (requires training, observation and supervision and, in some cases, a particular academic degree); GA. CT. R., APP. B, ALTERNATIVE DISPUTE RESOLUTION R. 2 (mediators must have twenty hours of classroom training and at least five supervised mediation observation or co-mediation experiences); N.J. CT. R. 3.2 (Municipal Court mediators must complete eighteen hours of training, continuing mediation training is also required); ILL. ANN. STAT. CH. 710, § 20/2 (Smith-Hurd 1992) (defining mediator as "a person who has received at least thirty hours of training in the areas of negotiation, nonverbal communication, agreement writing, neutrality and ethics"; this definition covers persons who perform court-attached mediation as well as mediation at tax exempt centers in Illinois); IND. CT. R. 2.5 (mediators in court-attached mediation must complete at least forty hours of training, and for civil cases must be an attorney, unless the parties otherwise agree) and R. 2.8 (guidelines for subsequent representation of parties); OR. ADMIN. R. §§ 718-40-020 to 718-40-050 (establishes thirty hours minimum of mediation training, and an additional six hours of training in court system, for mediators); UTAH CODE JUD. ADMIN. R. 4-510(3)(B) & (D) (requiring thirty hours of training and ten hours of experience, and that mediators conduct at least six mediations annually). This list of state provisions is not exhaustive. See generally *Symposium:*

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arbitrators another,<sup>16</sup> and many of these rules apply only to court-attached procedures.<sup>17</sup> This approach ignores the commonality among dispute resolution procedures as well as the variety within any particular label.<sup>18</sup> The biggest differences, indeed, may not be between what is labeled arbitration or mediation, but rather among dispute-resolution practices described with the same formal name.<sup>19</sup> By ignoring this diversity, regulation of ADR and TPs cannot produce the desired quality.

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*Certification of Mediators in California, supra* note 8.

<sup>16</sup> Among the state rules addressing arbitrator standards are FLA. R. CT. APP'T ARB. R. 1.810 (b) & (c) (requiring arbitrators [or at least the chairman of a tribunal, if more than one arbitrator serves] to "have been a member of the Florida Bar for at least 5 years" and to attend a 4-hour training course; the 5-year bar requirement may be waived by the parties.); WASH. R. SUPER. CT. R. 3.1 (requiring arbitrator to be "a member of the Washington State Bar Association who has been admitted to the Bar for a minimum of 5 years, or who is a retired judge" and permitting the parties to select a nonlawyer arbitrator.); GA. CT. R., APP. B, ALTERNATIVE DISPUTE RESOLUTION R. 2 (requiring that arbitrators must be lawyers, and the chairman of the panel, or the sole arbitrator if there is no panel, must have at least 5 years experience as a lawyer; the arbitrators must also complete six hours of training in a CLE approved program); UTAH CODE JUD. ADMIN. R. 4-510(3)(C) and (E) (requiring arbitrators to have been members of the bar for ten years, and to conduct at least three arbitrations annually).

<sup>17</sup> For example, the Texas state and federal rules apply to TPs (regardless of the form of proceeding) in court-attached cases. *See* W.D. TEX. LOC. CT. R. CV-88(d)(1) (1995) (requiring at least forty hours of training in an approved course for certification of neutrals, and law degree, or requiring judicial experience); Texas Civil Practice and Remedies Code § 154.052 requires TPs to have completed a minimum of forty hours of classroom training in "dispute resolution techniques" and, for family disputes, requires an additional period of subject-related training. *See generally* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701 (1994). For a comprehensive examination of federal court-attached ADR programs, *see* ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (CPR ed., 1995).

<sup>18</sup> *See* Dezalay & Garth, *Fussing About the Forum, supra* note 4; *but see* Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55 ("A fundamental difference between mediation and binding methods of dispute resolution is that in mediation, the parties decide themselves how to resolve their differences, with the mediator helping them get past their 'positions' so that their real interests can be addressed.").

<sup>19</sup> Regulators should also consider the competitive effect of training requirements upon other methods of ADR for which training is not required and upon TPs whose expertise and attractiveness are irrelevant to such training; such requirements may divide the pool of TPs available for court-attached ADR from those available for private ADR, if the requirements for training or licensing apply only to one group.

In considering the question of what quality means for TPs, we should not overlook the obvious: the wide variety of TPs doing ADR work today embody widely different notions of quality. Cyrus Vance, who acted as mediator in the Macy's bankruptcy, is a different kind of TP than the securities arbitrators who resolve industry disputes. Yet another kind of TP is the former judge who offers to serve as an arbitrator or mediator in private dispute resolution after leaving the bench. We recognize intuitively that these examples represent different versions of TPs; we can guess that Cyrus Vance, as a notable, will not be challenged on the basis of conflicts of interest which would present a problem for the securities arbitrator in an industry dispute. It is partly that there is a dual market in ADR: one market for large dollar amount disputes and one market for smaller disputes.<sup>20</sup> But the differences are deeper than this; they also reside in the versions of quality these TPs offer.

Our recognition that different kinds of TPs participate in the ADR market has not yet permeated the regulation of ADR and the role TPs play. This failure of regulation to reflect and integrate the fact of variety arises, at least in part, because our recognition of variety is indefinite. We lack empirical models to illuminate the differences among TPs as well as the response to those differences in the approach required by regulation. This Article fills that void by offering a new vision of TPs and the contexts in which they offer their services based upon unique data regarding the identity and practices of TPs. The data is derived from interviews with more than two hundred individuals involved in ADR and international commercial arbitration.<sup>21</sup> The data is especially useful given the secrecy

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<sup>20</sup> See generally *What We Know—And Don't Know—About Mediation*, DISP. RESOL. F., Oct. 1989, at 9, 12 (comments of Sally Engle Merry). Ms. Engle Merry explains:

There is a top tier of ADR which is expensive and in which mediators are highly paid, and a bottom tier in which the parties have low incomes and mediators volunteer, or are paid little. One way to understand these differences is to look at what each alternative is replacing. At the top tier, ADR replaces high-priced legal services . . . in the bottom tier, community mediation replaces court services which are already virtually free or completely free to the public.

*Id.*

<sup>21</sup> The interviews were conducted by Yves Dezalay and Bryant Garth, and are the basis for their book. See generally YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE INTERNATIONALIZATION OF LEGAL PRACTICE* (1996). Transcripts of the interviews are on file with the American Bar Foundation. The interviews indicate that very different conceptions of independence and conflicts of interest are at work among the participants in the international market for disputing services;



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surrounding much of ADR; furthermore, the data offers a national and international perspective for the role and work of TPs.<sup>22</sup> The international perspective clarifies the role of TPs and ADR in the United States as a contrast and complement; in addition, an international perspective is important as ADR moves into transnational and foreign practice. The data's geographical breadth is complemented by a breadth of perspective—those interviewed had experience as lawyers, consultants and TPs in international arbitration, domestic arbitration, mediation and in the judiciary—which provides a view of the competition for dispute resolution work. The diversity and richness of the data allow me to avoid the problem of partial views, common in the discussion—partial in the sense of being based on only one side's perspective or because of an attempt to impose the author's vision rather than contemplating the full complexity of practices and positions.

The Article begins in section II with an abstract discussion of the elements necessary for a "good" TP, that is, a TP whose dispute resolution work is characterized by fairness and effectiveness. "Quality" for a TP generally can be defined in terms of the TP's impartiality and authority. What these terms, authority and impartiality, mean, of course, is subject to considerable debate. The contours of these terms change with different TPs. We must assess both whether the version of authority and impartiality offered by a particular model is satisfactory, and whether the promised

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some of these differences can be understood as arising from the legal cultures of the participants.

The data are based on the interviews, rather than on numerical information. For a fuller description of the data, see DEZALAY & GARTH, *supra*. Within this paper, the interviews are designated solely by number and page. This is due to confidentiality concerns.

<sup>22</sup> In the United States, there tends to be a parochial vision of ADR; sometimes definitions of ADR exclude arbitration, neglecting the larger world of dispute resolution services and the continuum, within this world, of procedures ranging from judicial efforts to private negotiation. This vision of a continuum is helpful not only to establish the relationship between one segment of the market and another—because regulation of one segment has an impact on other segments, in terms of competition between and among them and the TPs who service them—but also to see ADR as perhaps an extension of the litigator-dealer lawyer dichotomy acknowledged in practice.

Often these definers fail to consider international arbitration as relevant to their work. An international view, however, helps to place the U.S. market in context, and it reveals the forces and competition which the market faces as ADR goes international. See *CPR Selects European Panel*, 11 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 66 (1993); Jacques Werner, *ADR: Will European Brains Be Set on Fire?*, 10 J. INT'L ARB. 45 (1993); Jean-Claude Goldsmith, *ICC Working Group Report on ADR*, 4 AM. REV. OF INT'L ARB. 413 (1993); DEZALAY & GARTH, *supra* note 21, at 179–181.

version is actually delivered.

Following this general discussion, section III describes six models of TPs, each of which offers a distinct picture of quality. The models are based upon the interviews described above and are presented in sequence from most to least elite, most self-regulatory to least self-regulatory—ranging from the elite small group of TPs, whose members offer their services on the basis of personal prestige and expertise and who depend upon personal referrals for business, to the large number of TPs whose common characteristic is essentially that their presumed expertise is based upon procedural training or substantive experience, and who have virtually no relationship to one another. The six models offer insight into the competition for the business of dispute resolution; when taken together, the models suggest that there is not one unified market in dispute resolution services in the United States.

This description and analysis of the models is necessarily detailed because it is critical to provide sufficient detail to reveal the texture of the versions of quality depicted. Each of these versions of quality has found a place in the international market for dispute resolution services. We can use these models to better understand the authority that different TPs bring to ADR, and consequently to consider different analytical approaches to these various settings.

The models indicate that in some settings we can rely upon the market as it operates, and in certain settings the TPs police themselves with regard to problems of quality. But in other situations, the market is ineffective because of insufficient available information, an absence of group self-regulation and poor monitoring of TPs' activities. This Article will not go into great detail about how to regulate every sort of TP, but the general contours of a variety of regulatory approaches are outlined in section IV. Section IV brings us back to the three examples of TPs described above—the notable, the former judge and the securities industry specialist—and explains how the models suggest appropriate analytical and regulatory approaches for these specific examples.

## II. IMPARTIALITY AND AUTHORITY

### A. Authority

A TP must possess authority to act in a dispute. This authority is the reason for the parties' willingness to cooperate with the TP and, in arbitration, to abide by the decision.<sup>23</sup> Authority validates the TP's power

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<sup>23</sup> A judge, for example, gains authority from her connection to the state and the state's

and participation in the dispute.

Two varieties of authority are relevant to this inquiry. First, a TP may have personal authority, meaning status and respect apart from the particular dispute. Second, the TP may have contextual authority, which means that the TP has some special ability relevant to a dispute. Personal authority and contextual authority are related and may even overlap in certain circumstances.

A TP's personal authority may arise from his social or economic position; his status, apart from the context of dispute resolution, places him in a respected position. The separation of the TP from the subject of the dispute is important here. His personal authority may place him above the need for financial or reputational compensation for his work, and his status is not dependent upon the dispute for validation.<sup>24</sup> The TP's indifference to future business and to the substance of the dispute, and the resulting absence of a need to please the disputants, creates an aura of independence, even superiority. In this respect, the personal authority of the TP places him in a position analogous to the judge, who has no need to be concerned about future business due to the term of his appointment and the fact that case assignment is divorced from the judge's identity. While many TPs offer personal authority, others do not.

Contextual authority, however, is important for all TPs. Contextual authority supports the work of a particular TP in a particular dispute, and it arises because of the TP's efforts, as opposed to his status. Contextual authority may result from the general professional experience of a TP in dealing with the substantive issues involved in the dispute. Experience in the work of, or apart from, ADR supports this authority, as does scholarship.<sup>25</sup> Contextual authority based upon expertise in a particular legal or other theory<sup>26</sup> relevant to the dispute, which may be revealed in

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power over its citizens. Judges are authorized by the state to use and develop law in deciding cases. Similarly, TPs working in court-connected ADR programs may be directed to base their actions upon legal principles and precedent. The private TP is neither authorized by the state, nor necessarily directed to decide or act according to law. On the consistency of settlements with legal principles, see Carrie Menkel-Meadow, *supra* note 2 at 2675-2676.

<sup>24</sup> Scholars whose status is tied to a particular theoretical perspective stand somewhat apart here because their reputations may be affected by the influence of their scholarship on a particular dispute.

<sup>25</sup> Experience gives the TP a breadth of vision which might encompass other legal systems, particularly relevant in international commercial arbitration, and other value systems, which might provide support for TPs whose actions need not be directly based upon legal rights. Scholarship might link the TP's work with principles of decisionmaking or negotiation.

<sup>26</sup> For a discussion of the reliance on theoretical bases outside of law for decisionmaking and authority, see Yves Dezalay, *Negotiated Justice: The French Example*, in BEYOND

scholarship, has characterized international arbitrators. For example, in international commercial arbitration, the authority of certain academics was connected to their scholarship regarding the *lex mercatoria*.<sup>27</sup>

A TP may also create contextual authority through his ADR work in substantively related disputes. Particularly in technical or very sophisticated matters, such expertise gained from repetitive work results in gains for the disputants, in terms of time savings and perhaps even quality of decisionmaking; the repeated exposure, however, also creates the possibility for bias.<sup>28</sup> Notwithstanding this concern, special panels of TPs with

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DISPUTING: EXPLORING LEGAL CULTURE IN FIVE EUROPEAN COUNTRIES 129 (Konstaze Plett & Cathy Meschievitz eds., 1991) (In some areas—such as business affairs, labor, juvenile delinquency—doctrinal investment is low or recent and undeveloped; “as a result there is a need in such fields to mobilize social resources emanating from the upper echelons, to mobilize expertise in order to solve disputes: . . . experts that range from social workers in juvenile courts right up to the great experts on maritime arbitration.”).

<sup>27</sup> *Lex mercatoria* refers to the idea that there exists an autonomous legal system to govern international commercial relations. One of the principal proponents of *lex mercatoria* was Professor Berthold Goldman. See, e.g., Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, in INTERNATIONAL CHAMBER OF COMMERCE, SIXTY YEARS OF ICC ARBITRATION 255 (1984). For another interesting view of the *lex mercatoria*, see Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in LIBER AMERICORUM FOR THE RIGHT HONORABLE LORD WILBERFORCE 149–184 (Bos et al. eds., 1987). The theory of *lex mercatoria* was the subject of considerable attention, both supportive and critical, by international arbitrator-scholars. A helpful starting point is W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 603–641 (2d ed. 1990). Only the senior grand professors were considered qualified to work with the *lex mercatoria*; their personal authority gave legitimacy to the theory. See Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 L. & SOC’Y REV. 27, 35–42 (1995).

<sup>28</sup> Pierre Lalive, a senior European arbitrator, cautions, “Expression of advice on a legal matter is not per se exclusive of the future independence of spirit or impartiality, and only fools, it may seem, never change their mind.” He argued that an arbitrator’s prior expression of views on a particular substantive issue should not be used to disqualify him. Pierre Lalive, *Conclusions*, in THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS 119, 126 (ICC Publishing, S.A. ed., 1991).

This same experience, however, also creates a potential for bias, either with regard to disputants, to the extent that they are common to several disputes, or with respect to an ideological position common to the disputes. According to Pierre Bellet, a well-known French judge and international arbitrator, “it is more serious to have been connected with the subject matter of the dispute than to have known the party, as that is not a question of friendship, but of self-esteem, which is by far the stronger feeling.” See Mohammed Bedjaoui, *The*

expertise in a particular substantive area are offered by ADR firms; similarly, specialized courts have recently been created to provide experienced judges for particular kinds of disputes.<sup>29</sup>

Contextual authority also may be based upon specific training completed by a TP, such as the training programs offered in the techniques of ADR work.<sup>30</sup> Similarly, experience in problem solving or negotiating generally, apart from the context of dispute resolution, also supports contextual authority. In this regard, the personal authority of a TP may support contextual authority as well, where, for example, the TP's personal authority derives from status as a negotiator.<sup>31</sup> Contextual authority shifts with the dispute; it is not constant with any particular TP.

## B. Impartiality

Impartiality ensures that a TP's actions will be based upon the merits of the dispute rather than the personal influence or identity of the disputants. TPs must be impartial in order for parties to feel that they are being treated fairly; it supports their confidence in the decisionmaking process.<sup>32</sup>

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*Arbitrator: One Man, Three Roles*, 5 J. INT'L ARB. 7, 16 n.14 (1988) (Bedjaoui explains, "This remark was thrown into the discussion on the case of one party's counsel becoming an arbitrator."). See generally Geoffrey C. Hazard & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 50-52 (1988).

<sup>29</sup> JAMS/Endispute has created panels of TPs in bankruptcy and environmental work. See *JAMS/Endispute Establishes Bankruptcy Panel*, 5 WORLD ARB. AND MEDIATION REP. 210 (1994). The rating system for FDIC/RTC neutrals gives experience acting as a TP more weight in determining a TP's qualifications than other factors also dealing with participation in ADR. See *Report of the FDIC/RTC Roster Qualifications Panel*, 5 WORLD ARB. AND MEDIATION REP. 17, 17-22 (1994).

The Delaware summary court procedures, see DEL. SUPER. CT. CIV. R. 124 & 125 (1995), are discussed in *Quick and Clean: Delaware's Experiment*, CORP. LEGAL TIMES, Aug. 1994, at 1; *Delaware Approves Alternative Business Court*, 5 WORLD ARB. AND MEDIATION REP. 29 (1994). See generally Margaret M. Eckenbrecht, *A Commercial Venture*, A.B.A. J., Jan. 1996, at 35 ("Fifteen states that together comprise more than half the U.S. population either have commercial divisions or are considering them.").

<sup>30</sup> A number of states have adopted training requirements for TPs participating in court-attached ADR. See NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY, FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS 19 (1995); see also *supra* notes 14-17 and accompanying text. Private ADR service provider firms, schools and bar associations also offer training. See *ESCAPING THE COURTHOUSE*, *supra* note 3, at 48.

<sup>31</sup> See *infra* notes 77-83 (discussion of Cyrus Vance in the Macy's bankruptcy).

<sup>32</sup> Fairness and confidence in the process are essential in ADR, in part because the right

Impartiality goes to the essence of the difference between an advocate and a TP. TPs occupy a position analogous to the judge in this regard; a judge's impartiality requires her to decide cases based upon the evidence and arguments, rather than grounds unrelated to the substance of the dispute.<sup>33</sup> Similarly, the TP's actions must be guided by the substance of the dispute rather than by the relative power and influence of the parties.<sup>34</sup>

Impartiality generally means the absence of bias. It has been described as a "purely intellectual attitude," which may or may not be based upon a

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to appeal is severely restricted. Under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), appeals are limited to cases where the award "was procured by corruption, fraud, or undue means," or where there was "evident partiality or corruption" on the part of the arbitrators, or where the arbitrators conducted the proceedings in a way that was prejudicial to one of the parties. 9 U.S.C. § 10 (1994). An award may be modified if it includes a matter as to which the arbitrators lacked authority. *See* 9 U.S.C. § 11 (1994).

<sup>33</sup> *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-372 (1978) (the basis for a judge's decision in litigation is evidence and arguments); *infra* notes 84-89 and accompanying text (discussion of the judicial model). *See also* ABA CODE OF JUDICIAL CONDUCT Canon 3 (1990).

<sup>34</sup> The comparison of an arbitrator's duty of impartiality to a judge's position regarding impartiality has sometimes been urged, but because of the limited right to appeal an arbitration decision, it could be argued that arbitrators should be subject to even stricter standards than judges. The connections of TPs to disputants and to commerce, generally, however, have supported standards of flexibility with regard to TPs on the issue of impartiality. For a discussion of TP impartiality, see *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968). In a concurring opinion, Justice White stated:

The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges . . . . It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards . . . . But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.

*Id.* (White, J., concurring). *See also* Betz v. Pankow, 38 Cal. Rptr.2d 107 (Cal. Ct. App. 1995); Lawrence F. Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, 3 AM. REV. INT'L ARB. 177, 180 (1992) ("The underlying principle was pronounced by Lord Langdale in *Harvey v. Shelton*, 7 Beav. 455, 462, 46 Eng. Rep. 1141, 1143 (1844), laying down the rule that arbitrators 'must not permit one side to use any means whatsoever for influencing the conduct and decisions of the [Tribunal], which means were not known to the other side.' (emphasis added)").

pre-existing relationship with the party towards whom there is bias.<sup>35</sup> Relationships may give rise to problems of impartiality,<sup>36</sup> but impartiality also may arise without regard to a particular relationship with the TP. Impartiality also can be defined as equal treatment; one who is impartial treats both parties the same, regardless of whether their circumstances indicate that equivalent results would be produced only by different or unequal treatment.<sup>37</sup>

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<sup>35</sup> See Mohammed Bedjaoui, *Challenge of Arbitrators*, in INTERNATIONAL ARBITRATION IN A CHANGING WORLD 85, 90 (Albert Jan van den Berg ed., 1993); the author also discusses the relationship between impartiality and independence. For a thorough analysis of the issues surrounding lawyers' independence apart from the context of ADR, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

<sup>36</sup> In certain circumstances, a relationship is so close that it establishes partiality, without consideration of the particular facts surrounding the relationship. For example, in *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984), the court ruled that a parental relationship between the arbitrator and an officer of one of the parties (actually, an officer of the international union, where the district union was a party to the dispute) required vacation of the arbitrator's award because the relationship established partiality on the part of the arbitrator.

<sup>37</sup> See Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 MEDIATION Q. 55 (1994) (considering impartiality apart from neutrality). Impartiality means an absence of bias because "[i]n order to subscribe to the dictate of impartiality, a mediator must refrain from acting as an advocate or assuming an adversarial role." *Id.* at 63. But neutrality involves the idea of fairness; where differences in power or sophistication of the parties result in one party needing the mediator's participation in order to equalize the two sides, neutrality is obtained by such mediator participation. Cooks and Hale support the idea that a mediator may need to treat parties differently in order to help them arrive at the same level and reach a "neutral" agreement. Impartiality may appear compromised in achieving neutrality. *See id.* at 64.

*See also* COLORADO COUNCIL OF MEDIATION ORGANIZATIONS CODE OF PROFESSIONAL CONDUCT § 2 (1982), reprinted in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 478 (1992) (defining impartiality as "freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties, as opposed to a single party . . . . Impartiality means that a mediator will not play an adversarial role in the process of dispute resolution."). For a similar use of the standard of impartiality, but in an active sense, see Bush, *supra* note 8, at 281.

*See generally* Salah Al Hejailan, *The Pre-arbitral Phase: Matters Affecting the Arbitral Award*, in INTERNATIONAL ARBITRATION IN A CHANGING WORLD 51-56 (Albert Jan van den Berg ed., 1993); *Experience of the ICC*, *supra* note 7, at 9; Stephen R. Bond, *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 J. INT'L L. AND BUS. 1 (1991).

The difficulty with ensuring that TPs are impartial arises because, in ADR, it is virtually impossible to eliminate all connections between the parties and the TP. Disputants generally select a TP for each dispute, and that selection is often based on prior relations between one or both of the appointing parties, or their representatives, and the TP.<sup>38</sup> This relationship is absent when the controversy is taken to court, and that absence may be one reason why parties opt out of the court system and choose ADR in the first place.<sup>39</sup> The existence of a relationship between disputants and the TP creates a problem for parties seeking both to appoint their preferred TP and to select a TP who is impartial. The parties need a TP who will resolve the dispute, or help them resolve their dispute, without regard to any relationship which might have led to the TP's appointment.<sup>40</sup> The basis for

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<sup>38</sup> In court-attached ADR, the court generally participates in the selection of the TP. *See generally* Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner's Update*, 14 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 7 (1996). But in private ADR, the parties are free to select a TP in any agreed-upon manner. Especially if they do not use the services of an ADR institution, they will be selecting based upon their personal knowledge of potential TPs, references from advisors (also probably based upon personal knowledge), and lists published by certain organizations which generally are too large to be helpful. As a notable international arbitrator observed, "arbitration owes its legitimacy and success to the fact that it was built upon the trust placed by the party in the arbitrator, whom it chose because it knew him. . . . [A] 'certain relationship' between the party and the arbitrator inevitably persists." Bedjaoui, *supra* note 35, at 86. A senior British arbitration participant commented, "You're often appointed as a party arbitrator by someone with whom you have worked before." Interview #10 at 13. A Continental lawyer reported, "I'm doing right now, for instance, a brief against . . . somebody who's been my co-arbitrator . . . in another case, you see, and I mean it happens that way." Interview #16 at 16.

<sup>39</sup> A U.S. lawyer involved in ADR commented:

One of these problems is the judges . . . . What the law firms are doing through us is saying we need a panel of appropriate judges. We need to be able to say to our clients, we can get you the kind of judge that is the kind of judge you think about when you think about going to court, you know.

Interview #1 at 12-13.

<sup>40</sup> The presence of ADR service provider firms creates an additional layer of relationships relevant to the issue of bias. These firms, both profit and not-for-profit, may contract with clients to administer all of their dispute resolution work; there may be imposed upon the clients' customers an agreement to use the ADR service provider firm in any dispute that might arise. *See generally* *More Retail Banks Turn to Mandatory Arbitration*, 5 WORLD ARB. AND MEDIATION REP. 232 (1994). This situation is worrisome because of the lack of negotiation between the parties to the dispute about the identity of the ADR TP, or at least



the TP's action might be legal rights, or it might be the interests of the parties or another principle, but it should be unconnected to the TP's relationship to the parties.

Two approaches—restriction and disclosure—have been used to promote impartiality. Restriction aims at eliminating or restricting relationships which might give rise to bias. Disclosure aims at informing the disputants of sources of possible bias. These approaches are not necessarily exclusive of one another.

Restriction operates in circumstances where the relationship between the TP and a party (or its representative) is so close that it causes a reasonable person to believe that it will impact the TP's conduct. Parental relationships are an example of the degree of closeness required before evidence of the facts in the particular case will be determinative.<sup>41</sup> Outside of such direct and close family relationships, restriction is likely to give way to an effort towards balance. The focus is often on equality of the relationships—neither party should be disadvantaged because the other party has a closer relationship with the TP.<sup>42</sup> This attempt to secure balance often guides the selection of TPs. The three-person arbitral tribunal common in international commercial arbitration simplifies the task of equalizing

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which ADR service provider will be used. The concern is that the TP will be biased in favor of the paying client in the disputes, to the detriment of the other party. The potential for bias produced by this situation has not yet been targeted by disclosure regulations, but it is clearly a source of concern. See generally *CPR Forms Ethics Group*, 13 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 14 (1995).

<sup>41</sup> Courts have wrestled with the issue of how close a relationship must be to indicate bias. For example, in *Hobet Mining, Inc. v. International Union, United Mine Workers*, 877 F. Supp. 1011, 1021 (S.D.W.Va. 1994), the court considered as one of four factors relevant to a claim of evident partiality "[t]he directness of the relationship between the arbitrator and the party he is alleged to favor . . . keeping in mind that the relationship must be 'substantial' rather than 'trivial,' in order to establish evident partiality." Cf. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983) ("relationship must be 'so intimate—personally, socially, professionally, or financially—as to cast serious doubt' on the arbitrator's impartiality"). It is generally accepted that at least in certain circumstances TPs will have had prior connections to the parties in a dispute. See *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1487 (S.D.N.Y. 1987); see generally J. Lani Bader, *Arbitrator Disclosure: Probing the Issues*, 12 J. INT'L ARB. 39, 46–49 (1995) (discussing the issue of relationships and bias).

<sup>42</sup> See generally Giorgio Bernini, *The Conduct of the Arbitral Proceedings: Standards of Behavior of Arbitrators*, in ICC, *THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS* 31 (ICC Publishing, S.A. ed., 1991) ("Being neutral means having, and always maintaining, a mental attitude which is, in concrete terms, wholly and actually equidistant vis-à-vis the parties.").

connections.<sup>43</sup>

Restriction also has been used as a regulatory mechanism in response to the perceived bias caused by the influence of future services.<sup>44</sup> Particularly in the United States, where the market for dispute resolution services is characterized by rapid expansion and competition, the need for future business is a potential source of bias. TPs obtain work from references about their past work, as do lawyers and other professionals generally. But the parties to a dispute want to ensure that the TP will act impartially *in their dispute* and will not be biased towards one side or the other in order to curry favor so that he will be hired again in the future.<sup>45</sup> Particularly in disputes involving one repeat-player party, the concern is that a TP will favor that party in order to gain future business.<sup>46</sup> The TP may direct his

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<sup>43</sup> A party-appointed arbitrator will generally have some connection to the party selecting him, although the extent of the connection acceptable has been the subject of controversy. See *Hobart Mining, Inc. v. International Union, United Mine Workers*, 877 F. Supp. 1011, 1019 (S.D.W.Va. 1994). In the United States, party-appointed arbitrators sometimes have been seen as party advocates, subject to lower standards regarding impartiality than the third arbitrator. In international commercial arbitration, the party-appointed arbitrator is considered to occupy the same position as the other members of a tribunal with regard to issues of impartiality and independence. For a discussion of the role of the party-appointed arbitrator, see James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 AM. REV. OF INT'L ARB. 153, 153-169 (1992); Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59 (1995); Robert Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103 (1987).

A similar effort at balance is at work in a scheme utilizing co-mediation at a Chicago hospital, where each party chooses a mediator. See Carol McHugh Sanders, *Rush Pres-St. Luke's Hopes Its Mediation Program Is Contagious*, CHICAGO LAW., April 1996, at 4.

<sup>44</sup> The influence of future services might also be resolved in individual cases by appointing a TP who is unaffected by the potential for such services because of her age, financial security and reputation. One international arbitrator noted that he was selected for a politically sensitive tribunal because of his age and position, which protected him from needing to act in order to build his career; his freedom from concerns about his future made him attractive for his impartiality and intellectual independence. See Interview #4 at 9.

<sup>45</sup> See ESCAPING THE COURTHOUSE, *supra* note 3, at 4. See also Richard C. Reuben, *supra* note 18, at 61.

<sup>46</sup> The repeat-player issue arises when a particular disputant is involved in a number of related disputes because of the nature of the disputant's business; the concern is that the repeat-player will be advantaged because of its experience with dispute resolution generally, and also that a TP may be biased in favor of the repeat-player in order to be selected as TP in

attention toward the disputant or its representative, making detection even more difficult.

This concern about bias from the prospect of future business might be resolved by restricting a TP's successive participation in disputes involving a common party. For example, the Standards of Conduct for Mediators, proposed by the AAA, the ABA and SPIDR, counsel that a mediator cannot subsequently represent one party to a resolved mediation without the consent of the other party to that dispute if "legitimate questions about the integrity of the mediation process" would be raised by the subsequent representation.<sup>47</sup>

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its future disputes. On repeat-players generally, see Marc Galanter, *Why The 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Hazard & Scott, *supra* note 12, at 58-59.

It is more difficult to police the effect of repeat business within an industry but outside of the common disputant. A TP can acquire general expertise through repeated involvement in disputes common to a particular industry, and the concern is that the TP may develop a sympathy towards the industry; in this situation, there will be no long-term relationship between the TP and a particular party. While clients sometimes can require a lawyer to work as an advocate for only one side of a dispute as a business matter, this power of a disputant over a TP is generally lacking in ADR. One lawyer who works as a mediator in one substantive area and as a consultant in an unrelated substantive area, commented, "I wouldn't be comfortable mediating cases in the substantive area I do consulting, for the same client or another person, because of potential conflicts. I wouldn't consult for people who are on the opposite side [of the general issues] of my consulting clients." Interview #2 at 3.

<sup>47</sup> *Standards of Conduct for Mediators*, 5 WORLD ARB. AND MEDIATION REP. 223, 224 (1994). The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes also considers future action as it casts an influence on an arbitrator's duties and warns arbitrators about entering into relationships "likely to affect impartiality or . . . create the appearance of partiality or bias . . . in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest." Canon I(D), reprinted in PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, GUIDE TO INTERNATIONAL ARBITRATION AND ARBITRATORS 453 (2d ed. 1992).

See also *In re New York City Asbestos Litig.*, 737 F. Supp. 735, 741-742 (E. & S.D.N.Y. 1990) (analogizing the standard for disqualification of a mediator to the position for special masters).

[C]ourts have recognized that it is inevitable that special masters—like court-appointed experts, but unlike judges—will often be chosen from the ranks of practicing attorneys who themselves have prior expertise in the subject matter and prior association with experts in the field . . . . In light of this inevitability, the Court of Appeals for the Second Circuit has found as a "general" rule that disqualification [of a special master] is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated.

Disclosure offers an alternative regulatory approach to restriction of potentially influential relationships. In the context of bias resulting from relationships that lead to the appointment of a particular TP, disclosure acts to equalize the influence. In essence, it gives notice to both disputants of the potential sources of bias, permitting consent or challenge.<sup>48</sup> This disclosure

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Rios v. Enterprise Ass'n of Steamfitters Local 638, 860 F.2d 1168, 1174 (2d Cir. 1988) (citations omitted).

<sup>48</sup> The principle behind disclosure in ADR is to enable the parties to weigh the risk of current influence stemming from past dealings against the desire to have this particular TP work on the dispute. By consenting to the TP's appointment after learning of his past contacts, disputants in effect waive their right to object to the conflict, absent other circumstances showing that the TP actually acted in a partial manner. See Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579 (1992); see also Matthew D. Diseo, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113 (1993) (distinguishing among the relationships that indicate bias).

Nearly all regulations of ADR and TPs utilize disclosure, at least to some extent, to address concerns about impartiality. Rule 7.3 of the CPR Rules for Nonadministered Arbitration of International Disputes, for example, provides that a nominee must disclose "circumstances that might cause doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel." RULES FOR NONADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES RULE 7.3 (1992). See also CENTER FOR PUBLIC RESOURCES INC., CPR LEGAL PROGRAM, MODEL ADR PROCEDURES, MEDIATION OF BUSINESS DISPUTES § II.B. (1991).

The International Bar Association Rules of Ethics for International Arbitrators, Rule 4, requires disclosure of all current and "more than trivial" past business relationships between the arbitrator and any party, representative of a party, or a "potentially important witness in the arbitration." INTERNATIONAL BAR ASSOCIATION RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS RULE 4 (1992). Disclosure is also required of "substantial social relationships" with parties or witnesses and prior relationships with co-arbitrators. PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, THE 1989 GUIDE TO INTERNATIONAL ARBITRATION AND ARBITRATORS 412 (1989). The AAA also offers ethics rules for TPs in commercial arbitrations, and its disclosure obligation includes "existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias." *Id.* at 418. See also Robert Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103 (1987). Arbitral institutions, such as the ICC, and statutory schemes, including UNCITRAL, also include disclosure standards. See *infra* note 122. Finally, several states have enacted disclosure rules for TPs; California's is the most comprehensive, requiring disclosure of the results of a TP's other ADR work in order to inform the disputants of a pattern of bias within an industry or substantive dispute. See CAL. CIV. PROC. CODE

enables the parties to protect themselves against favoritism for the purpose of gaining future business.<sup>49</sup> But the reliance on disclosure to cure problems of bias must be balanced against the value of secrecy for disputants in

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§ 1281.9(a)(2) (Deering 1995). For a discussion of these issues and the California regulations, see Bader, *supra* note 41, at 46-49. See generally Disco, *supra*, at 113.

Case law also supports a TP's obligation to disclose certain facts and relationships. See, e.g., *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968). Disclosure issues often arise in cases challenging awards on the basis of "evident partiality . . . in the arbitrators." 9 U.S.C. § 10 (1994). The current issue in the courts is whether evident partiality means the mere appearance of partiality or evidence of facts indicating bias in the particular case. See Bader, *supra* note 41, at 45-46 (documenting that the mere appearance of partiality is generally held insufficient). For an illustration of the current boundaries of the disclosure obligation, see *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 40 Cal. Rptr.2d 700 (Cal. Ct. App. 1995). Mediators' disclosure obligations are discussed in *McEnany v. West Del. County Community Sch. Dist.*, 844 F. Supp. 523 (N.D. Iowa 1994); *In re Joint E. & S. Dist.'s Asbestos Litig.*, 737 F. Supp. 735, 740-741 (E. & S.D.N.Y. 1990). See also *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995) (articulating the standard to be applied to a mediator-attorney's subsequent representation of one party to a prior mediation as "[w]here a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation proceeding consent after disclosure"). On the *Poly Software* case standard, see Susan M. DiMickelc, *Conflicts and the Courts*, DISP. RESOL., Spring 1996, at 3.

One aspect of the IRS' recently adopted tax mediation program is a requirement that mediators prepare a written report stating the "issue(s) submitted for mediation and whether or not the parties reached a settlement." *IRS Launches Pilot Mediation Program for Large Case Appeals*, 6 WORLD ARB. AND MEDIATION REP. 240, 241 (1995). The mediator's report will be disclosed only to the parties, unless they otherwise agree; still, the requirement of a written report creates the possibility for disclosure of the nature and consequences of the TP's participation.

<sup>49</sup> See CAL. CIV. PROC. CODE § 1281.9(a)(2) (Deering 1995) follows this approach, as does Florida's regulation of the court-attached ADR program. Florida requires disclosure by arbitrators of "any current, past, or possible future representation or consulting relationship with any party or attorney involved in the arbitration." FLA. R. FOR COURT-APPOINTED ARBITRATORS R. 11.080(b)(1) (1994). For a general discussion of court-attached mediation in Florida, see James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation'?*, 19 FLA. ST. U. L. REV. 47 (1991). Cf. James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 AM. REV. OF INT'L ARB. 153, 168 (1992) ("Prior involvement in arbitrations as appointee of the same party, or involving the same counsel, are appropriate matters for mandatory disclosure but ordinarily not a ground for disqualification.").

ADR.<sup>50</sup>

## III. THE MODELS

In this section, I will describe six models of TPs, each with differing combinations of authority and impartiality. The models illustrate the variety of what is meant by quality with regard to TPs. The diversity of the models is supported by the market for dispute resolution services, which has adjusted to take advantage of their differences.

The models are presented here in an order that places the most self-regulatory elite groups first, moving towards the least cohesive groups. Each model shows how, in different locations or on certain planes of activity, people distinguish themselves as capable of acting as TPs—they use their distinctive characteristics to gain the trust of the parties to a dispute and acceptance by the legal community in which the dispute is resolved.<sup>51</sup>

The models should not be interpreted as representing discrete, exclusive categories; rather, the data supporting this categorization indicate that the models are in fact tendencies that appear in contrast and comparison to one another. In reality, a person who described herself in such a way that she fit squarely within one model might, in a different context, consider herself closer to others who define a second model. Her description may change depending upon her competition; that is, the models can be viewed as competitive with one another for the right to define quality. The models may even overlap at times, and no model is innately superior to another.

The first two models can be described as self-regulatory elite models. They are based upon settings where a small group controls the ADR work, and these few people act in concert to maximize their control over the

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<sup>50</sup> See, e.g., Alan Kirtely, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1.

<sup>51</sup> See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* 3 (1988), where "the creation of a profession is analyzed in terms of changes in jurisdictional control."

Professions develop when jurisdictions become vacant, which may happen because they are newly created or because an earlier tenant has left them altogether or lost its firm grip on them. If an already existing profession takes over a vacant jurisdiction, it may in turn vacate another of its jurisdictions or retain merely supervisory control over it.

*Id.* ADR can be seen as a new, or expanded, jurisdiction, where a void exists with respect to judges, lawyers, accountants and others. The issue of whether these existing professions will fill the void or whether they and others will combine to form a new profession of TPs is still open. See generally Benjamin, *supra* note 12, at 131.

group's identity and the prestige of their work. In international commercial arbitration, the members of the group assume various roles, sometimes acting as counsel, other times as arbitrator. Members sometimes switch sides within a general substantive controversy.<sup>52</sup> The self-regulatory elite are a homogenous group because of both self-selection and training. Their ability to monitor each other's work, through control of the entire area (or major share) of disputes, coupled with their promotion of the quality of their services, provides assurance that the members of this elite group will work together to produce a picture of authority and impartiality.

Two examples of the self-regulatory elite model emerged from the data: English barristers who do international commercial arbitration and senior European international arbitrators. In each of these groups, the participants have been generally successful in monopolizing dispute resolution while at the same time offering impartiality and authority.

### *A. QCs of the Commercial Bar*

Most of the relatively high stakes commercial arbitration in England<sup>53</sup> is controlled by a small group of barristers, the Queen's Counsel (QCs) of the commercial bar.<sup>54</sup> Prior to 1979, this group of QCs controlled all of the

<sup>52</sup> For example, one international lawyer who had represented an oil company in connection with the nationalizations by Middle Eastern countries in the 1970s and 1980s was later consulted by one of the Middle Eastern countries on several matters. He described the earlier arbitration as "friendly"; he had maintained good relations with his opposing counsel, which led to subsequent referrals. See Interview #3 at 20-21.

<sup>53</sup> See generally ALAN REDFERN & MARTIN HUNTER, *INTERNATIONAL COMMERCIAL ARBITRATION* 198-201 (2d ed. 1994) (describing the powers of arbitrators). "International arbitration" in Britain has at least two different meanings. On the one hand, it means ICC-type cases where the parties are from different countries and the essence of the dispute involves international commerce—those disputes are generally controlled by the QCs. On the other hand, there is an entrenched system of arbitration in England, including shipping and construction disputes, where the parties are from different countries, but the rest of the dispute is English—English contract and English law applies. These disputes are often resolved by lay arbitrators. See DEZALAY & GARTH, *supra* note 21, ch. 7.

<sup>54</sup> The legal profession in England is formally divided into two basic groups of barristers and solicitors. Solicitors numbered about 76,000 in England and Wales in 1994, and barristers numbered about 7,735 at that time. See Grania Langdon-Down, *Plan to Make Barristers more Approachable*, PRESS ASS'N NEWSFILE, Feb. 28, 1994, available in LEXIS, Nexis Library, Home News File. Barristers have traditionally been seen as the elite of the two branches of the profession, and within the group of barristers, a small group (about 10%) become Queen's Counsel. See Frances Gibbs, *Taking the Silk Road to Success*, THE TIMES (LONDON), Oct. 19,

borders of arbitration work. They not only acted as arbitrators, but they also argued cases that were appealed to the Commercial Court and were part of a small group from which were drawn the judges of the Commercial Court.<sup>55</sup> While this community has become more diverse since 1979, the commercial QCs continue to exert substantial control over commercial and international arbitration situated in London.

The group of QCs doing commercial arbitration and litigation has traditionally been quite small. There are a limited number of chambers performing sophisticated commercial work<sup>56</sup> because barristers tend to share chambers with other barristers in the same specialty, in part to ease scheduling conflicts.<sup>57</sup> And of these commercial QCs, most participate in commercial arbitration. As one member of the group commented, "I would think that a substantial portion of the practice of any commercial Queen's Counsel in London involves arbitration, either as counsel or as arbitrator. It's part of the practice."<sup>58</sup> Another QC reported that "the arbitral

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1993, at 35.

The preference for barristers over solicitors is also generally characteristic of domestic English arbitrations. *But see, Three New ADR Services in Scotland*, 5 WORLD ARB. AND MEDIATION REP. 259-260 (1994) (both barristers and solicitors are participating as mediators in Scotland).

<sup>55</sup> Prior to 1979, arbitral awards in England could be appealed and reviewed by the Commercial Court, on the theory that consistency of arbitral awards with Commercial Court decisions was important to the commercial attractiveness of English law. *See REDFERN & HUNTER, supra* note 53, at 420-423. The QCs who acted as advocates in commercial arbitration also acted as advocates in Commercial Court litigation, and they were among the same people who served as arbitrators in these disputes. *See DEZALAY & GARTH, supra* note 21, ch. 7. Typically there would be two lay arbitrators and one QC chairman arbitrator. Because the QCs controlled access to the Commercial Court, they also controlled the commercial arbitral community.

On the role of the Commercial Court generally in international business disputes, see Mary Heaney, *Where Business is King*, NAT'L L.J., June 5, 1995, at C1, C1-C3.

<sup>56</sup> "Barristers have always specialized . . . . But in London, a substantial number of sets are known for their specialties: in 1967, there were six in tax, six in patents, two in Admiralty, two in shipping, about six in heavy commercial matters . . . ." RICHARD ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 114-115 (1988). *See DEZALAY & GARTH, supra* note 21, at 130 (reporting that the commercial bar "even today comprises less than 10 percent—some 550 out of 6,500—of the bar in general").

<sup>57</sup> *See ABEL, supra* note 56, at 108.

<sup>58</sup> Interview #27 at 1. Another QC reported:

It's just a way things happen in the law here. You . . . acquire a certain reputation for being quite active as a practitioner . . . . [Y]ou become a Queen's Counsel usually somewhere between 40 and 45, that sort of age. And sooner or later once you're



community here was actually very, very close."<sup>59</sup>

The commercial bar works closely with the Commercial Court. Cases brought or appealed to the Commercial Court are typically heard by justices who came from the same chambers as the QC-advocates and arbitrators and who have previously worked on the same sorts of cases as both advocate and arbitrator.<sup>60</sup> The connection of advocates, arbitrators and judges among the same group of people, who also share chambers in many cases (or did, in the case of judges), led to an unanimity of approach, which gave the QCs authority with regard to the substantive law and the procedural aspects of the disputes. The QCs and the Commercial Court judges cooperated to produce a predictable commercial law, applicable to all disputes regardless of forum.

The structure of the system regulating English legal practice supported this thorough control by limiting competition both from outside the group of barristers and from within the group. The resulting homogeneity among the QCs supports their authority as TPs. The regulation of entry and organization of barristers' practice produces a close-knit group of mostly socially elite professionals who are isolated from lay people and to some extent from other professionals.<sup>61</sup> After their basic training, would-be

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Queen's Counsel and you're doing this sort of work, somebody's going to say, "Can we appoint you as an arbitrator . . . ?"

Interview #28 at 3.

<sup>59</sup> Interview #5 at 9.

<sup>60</sup> See DEZALAY & GARTH, *supra* note 21, at 132 ("The commercial bar would thus bring cases to persons they knew and who were themselves formed in their practices through work on the same sets of issues in the same chambers."). The substantive issues involved in the cases might be the same regardless of a case's forum.

<sup>61</sup> See generally BRIAN ABEL-SMITH & ROBERT STEVENS, *LAWYERS AND THE COURTS* 25-27 (1967) (describing the development of the profession and the historical importance of social status). Barristers resisted the efforts of the government to influence legal education and entrance examinations, and they were isolated from the commercial world because of the requirement that clients first consult a solicitor before retaining a barrister.

Restriction on entry into the profession of barrister has recently undergone change, with a view to opening up the profession to gain diversity. But until recently, persons wishing to become barristers needed "good social contacts," among other things, to successfully make it into chambers. "[I]t was generally agreed that given good social contacts, reasonable academic achievement and attendance at a set number of Inns of Court dinners, success was assured." Sharon Wallach, *Law: Competition Is a Bar to a Job for Life*, *INDEPENDENT*, Jan. 7, 1994, at 31.

Competition for work is intense among barristers, and it is difficult for young barristers to find a place in chambers. See Sally Hughes, *Fighting to the Death for a Place in Chambers*, *THE TIMES* (LONDON), Feb. 14, 1995, at 35 ("Inviting someone to join an

barristers must complete a year-long pupillage in chambers—not necessarily a paid position—and there are many fewer pupillages than there are students.<sup>62</sup> The result of these entrance barriers has been that members of the upper classes of the community have generally been more successful in establishing themselves as barristers.<sup>63</sup> Furthermore, in order to rise to the level of QC, barristers needed the support of judges, which further solidified the connection between QCs and the judiciary.<sup>64</sup>

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established set is an ambivalent exercise, especially for the junior tenants, who will be competing with any newcomer for briefs coming in, via the clerks. The Temple is rife with stories . . . of some of the best candidates being turned down precisely because of in-house competition.”).

<sup>62</sup> The lack of payment means that would-be barristers must either have sufficient family money to support themselves or apply to the select chambers that subsidize the pupillage period. See Wallach, *supra* note 61, at 31. But see Roger Henderson, QC, *Changing Face of the Bar*, THE TIMES (LONDON), Jan. 25, 1989, at 12. Henderson writes:

The financial hardship traditionally associated with pupillage has also been greatly mitigated in recent years. Until the early 1970s pupil barristers were often required to pay their pupil-masters for their year's apprenticeship. Happily, this practice has been abandoned . . . . The vast majority of London chambers now offer pupillage awards. In addition, some guarantee a level of income or a good supply of work in the second six-month pupillage which a trainee barrister must perform.

*Id.* See also ABEL, *supra* note 56, at 60–62.

In finding a place in chambers, nepotism is, or was until recently, still a factor. See Hughes, *supra* note 61, at 35. See also Henderson, *supra*, at 12. Henderson notes:

[T]here have been noticeable changes in the origins of those whom it [the Bar] has welcomed. A parental-occupation analysis of students of the Inner Temple . . . shows that of those now at the Bar who entered the Inn in 1964, 91 per cent came from social classes A and B. By 1984, the proportion was 48.5 per cent, with 10.5 per cent from so-called lower and middle-class backgrounds and 22.5 per cent with a parent who was a skilled, semi-skilled or unskilled manual worker. For example, the list of last year's new QCs included the son of a coalminer.

*Id.*

<sup>63</sup> See Fiona Cownie, *The Reform of the Legal Profession or the End of Civilization as We Know It*, in THE CHANGING LAW 213–234 (Fiona Patfield & Robin White eds., 1990).

See also ABEL, *supra* note 56, at 75–76 (“[I]t is class position that is being reproduced more than membership in the profession.”). Abel emphasizes the importance of a barrister's class in determining success: “[C]lass affects pupillage, tenancy and ultimate success in practice more strongly than it affects the calling to the bar.” *Id.*

<sup>64</sup> See *id.* at 98. On the issue of the identity of the judges and their relationship to barristers, see ROBIN C.A. WHITE, THE ADMINISTRATION OF JUSTICE 230–232 (2d ed. 1991).

Along with the close identity between QCs and judges—both being drawn primarily from the elite—is the similar connection of the international commercial disputants to these groups. The disputants also were members of the elite by virtue of their economic position; they met with QCs and judges outside of formal legal proceedings, where they discussed their problems.<sup>65</sup> This close relationship among the parties to the disputes and the QCs and judges enabled them to work together to create a system of resolving disputes in a way that was helpful both to business, through predictability, and to the QCs and judges, in providing them with the necessary authority to resolve disputes.

## B. *The Core Senior International Commercial Arbitrators*

International commercial arbitration became the accepted and expected way to resolve international disputes<sup>66</sup> primarily because of the efforts of a small group of Continental academics and, to a lesser extent, jurists. They worked together to make international arbitration effective—in terms of both enforceability<sup>67</sup> and acceptable procedures—and prestigious, mainly through scholarship. A brief look at the way international commercial arbitration developed indicates the character of the TPs who have become leading arbitrators.

The “founders” of international commercial arbitration, who were most active from the 1960s through the 1980s, came from the civil law countries of France, Switzerland, the Netherlands, Germany, Sweden, Austria and Italy. The core group was quite small, perhaps having as few as 10 to 15 persons at times, with more representatives from France and Switzerland than elsewhere. In addition to this core group, there were networks of interested lawyers in each country as well as representatives from countries

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I do not mean to favor the class domination of QCs, only to suggest its relevance to the characteristics of QCs as TPs.

<sup>65</sup> One QC, describing the shipowners’ relationship to arbitrators and QCs who might act as advocates in arbitrations, said of the relationship between business people and lawyers: “[T]he community was quite small because they would meet the judges and it was a very symbiotic relationship . . . . They’d discuss cases . . . .” Interview #5 at 11.

<sup>66</sup> Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 L. & SOC’Y REV. 27, 35-42 (1995).

<sup>67</sup> Enforcement of arbitral awards is generally governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (adopted by the United Nations Conference on International Arbitration in 1958), which regulates the recognition of such awards. See generally W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 659-679 (2d ed. 1990).

outside of Continental Europe who participated, to varying degrees, in international commercial arbitration work.<sup>68</sup>

The members of the core group enjoyed positions of prestige in their own countries, generally as academics.<sup>69</sup> The civil law professors<sup>70</sup> serve as

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<sup>68</sup> I've appeared in Scandinavia, in the U.K., in France and in Switzerland, in Italy and I run into the same lawyers everywhere[;] it's the same names . . . . And so to that extent I think the arbitration bar once you go . . . outside the United States is a very fungible group and it's the same people over and over . . . . [I]f this were Casablanca we'd call them the usual suspects.

Interview #7 at 10–11. A member of this core group commented:

[L]ast year, for instance, I had two big arbitration cases and in both cases was my friend Professor Goldman. It's always the same, you know . . . because of big cases you look for people who have some experience . . . . [Y]ou fall back, in my opinion, mostly on the range between 10 and 15 well-known names.

Interview #8 at 15.

<sup>69</sup> The civil law tradition favors the separation of pronouncing the law and legal doctrine from the taint of business interests. Merryman suggests that the divided profession characteristic of much of the civil law world explains this separation: "One predictable result is a tendency for the lines that divide one career from another to sharpen. Those involved in one branch of the legal profession come to think of themselves as different from the others." JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 102 (2d ed. 1985).

Osiel furthers this analysis through examination of the competition of members of the legal profession with nonlawyers, notably accountants and bankers. He suggests that the specialist nature of courtroom work, which *only* a lawyer could do, impacted negatively upon other work performed—but not exclusively—by lawyers. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2030 (1989) (reviewing RICHARD L. ABEL & PHILIP S.C. LEWIS EDS., *LAWYERS IN SOCIETY* (1989)). Osiel writes:

Whereas American bar associations have vigorously brought prosecution against "unauthorized practice," and so have been "unusually imperial" . . . in pressing for exclusive jurisdiction over legal counseling and advice, "laymen" in virtually all other Western countries may perform many of the "legal" services that American lawyers regard as uniquely their own. The scope of lawyers' monopoly in other countries is generally strictly limited to activities such as advocacy in the highest courts (English barristers), the transfer of real estate (English solicitors, until recently), or the formal authorization of contracts and deeds (French *notaires*). "Nonprofessionals" who have considerable legal education but who did not graduate from law school or obtain an official license largely comprise the legal staffs of large organizations . . . .

To be sure, the individuals in such countries whom we would consider to be

interpreters of law; their prestige traditionally was inversely related to their proximity to commercial matters.<sup>71</sup> These academics were generally members of the elite socioeconomic classes in their communities.<sup>72</sup> Their privileged backgrounds supported their personal authority simply because of their social position. They could afford financial independence as well, giving them some degree of freedom from the concern over future business. While their social status may have devolved from money made in business, their professional status derived from being as separate from business and trade as possible, giving the authority emanating from the status of law professor more weight in connection with business interests from which the

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"lawyers" seek, like their American colleagues, to derive much of their income from these same services. But because the scope of lawyers' monopoly is too narrow to provide a comfortable income, they must compete with members of other groups who provide such services, groups whose members are often subject to fewer restrictions, such as accountants and bankers.

*Id.* at 2030 (footnotes omitted).

Cf. Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149, 180-181 (1994) (considering the opposite force of the influence of nonlaw work by nonlawyers on lawyers, specifically the influence of divorce mediators, who are not lawyers, on divorce lawyers).

<sup>70</sup> Richard Abel reported, "[I]n northern Europe, law professors earn high salaries and receive the highest prestige of any legal professional. In southern Europe . . . they also enjoy considerable status; but their low salaries compel them to spend most of their time in private practice . . . ." Richard L. Abel, *Lawyers in the Civil Law World*, in 2 LAWYERS IN SOCIETY 1, 12-13 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

<sup>71</sup> See MERRYMAN, *supra* note 69, at 108. In the common law system, this function of interpreter is occupied by judges who, together with practitioners, discover "spaces" between decided and stated law to use in reformulating and redirecting the law in the case of the judge, and arguing for her client's position in the case of the practitioner. See Osiel, *supra* note 69, at 2060-2061.

<sup>72</sup> In France, for example, until the mid-1960s, most of those who attended universities were members of the elite; furthermore, in order to become a law professor one needed financial support during the years of study and until an opening at a university law faculty became available. See David M. Trubeck et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 448-453 (1994).

The successful scholar would position himself as a disciple of a great professor and wait until the appropriate time to be launched into his own career. "The uncertainty of success in pursuit of a professorship is so great that few can afford to gamble exclusively on it." MERRYMAN, *supra* note 69, at 107. The ability to pursue scholarship regardless of economic support was one of several characteristics which distinguished these professors from practitioners, whose backgrounds generally were less privileged.

separation was needed.<sup>73</sup>

The social and professional status of these senior professor-arbitrators provided them with authority within their national systems, and the core group of senior arbitrators organized internationally as well. They created a small network, with themselves at the center, to convey and create information about international commercial arbitration.

The participants in international commercial arbitration became acquainted with each other not only through common cases, but also through their participation in the professional organizations supporting arbitration, such as the exclusive International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce's Institute of International Business Law and Practice. These organizations and others sponsor colloquia, where interested participants can become acquainted with one another, exchange views and stories about arbitration and initiate newcomers to the field.<sup>74</sup> These meeting places—organizations, conferences and journals—facilitate the exchange of information about arbitration's participants. According to one international arbitrator, "[I]t's a small circle.

<sup>73</sup> That is, the fact that the disputes being resolved were commercial in substance made their separation from and autonomy with regard to business imperative.

Merryman clarifies the separation of law and commerce:

The doctrine is the basis of the legal system and is thought to represent objectively stated scientific truth. The doctrine is not law in action, and indeed the scholar would regard attention to such matters as diversionary. . . . He fears that if he became involved in these activities [of enacting statutes or deciding cases], he might lose his objectivity and perspective, and in any event would be misusing his time, which should be spent on more fundamental, and hence more valuable, work.

MERRYMAN, *supra* note 69, at 81. The subtle change that can be seen in the professor's move to international commercial arbitration is described by Dezalay and Garth. See DEZALAY & GARTH, *supra* note 21, ch. 10.

<sup>74</sup> See DEZALAY & GARTH, *supra* note 21, ch. 1. The origins of ICCA, described by one of its founders, illustrates the closed nature of the core group:

I was . . . in Europe representing the Netherlands at the discussion in Geneva . . . [a]nd . . . we had regular meetings with very nice delegates from other countries. And there the idea grew—it was to bring friends—to organize more congresses on arbitration. And so the first congress was held in Paris with my friend Jean Robert . . . And at first it was not institutionalized. And then you know we institutionalized the whole thing.

Interview #8 at 5. The organizations, conferences and journals provide an opportunity to be known by others active in arbitration, so that one's name might be remembered when the need for an arbitrator arises.

## MODELS OF QUALITY FOR THIRD PARTIES IN ADR

People know each other.”<sup>75</sup> They recommend each other, even as they oppose each other.<sup>76</sup>

### C. *The Notable Model*

The notable model is represented by an individual with a singular personal reputation. This reputation is independent of any particular affiliation, and it carries a presumption of wisdom and the perception that this TP is above suspicion regarding impartiality. Every notable TP brings a high degree of personal authority to the dispute resolution table. This authority might be based upon experience in some aspect of negotiation or in the subject matter of the dispute (which is one way to gain notoriety); it might be based upon his prestige, earned quite apart from experience, and the resulting respect of enough of the population—including the parties to the dispute—to be recognized as worth listening to; or it might be based upon a combination of these elements.<sup>77</sup>

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<sup>75</sup> Interview #14 at 11.

<sup>76</sup> See Interview #3 at 20–21; see also DEZALAY & GARTH, *supra* note 21, ch. 2. According to a senior arbitrator, “You’re often appointed as a party arbitrator by someone with whom you have worked before . . . .” Interview #10 at 13. One arbitration insider described his experience as follows: “I’m doing right now . . . a brief against . . . somebody who’s been my co-arbitrator . . . in another case you see, and I mean it happens that way.” Interview #16 at 16. Another European arbitrator commented, “[W]e have more of the combination of arbitrators and lawyers [with] many people being arbitrator one day and a lawyer the other day . . . .” Interview #25 at 5.

<sup>77</sup> See Kenneth R. Feinberg, *Baseball Mediation: Get a Power Hitter*, N.Y. TIMES, Aug. 21, 1994, § 3, at 9 (dismissing the efforts of mediators from the Federal Mediation Service to settle the 1994 baseball strike because the mediators were not notables). Feinberg suggested Generals Colin Powell and Norman Schwarzkopf as possible helpful mediators, both of whom fit the notable description. See *id.*

In international commercial arbitration, the notable is viewed more in the context of a generational divide. The older generation was composed of a few men who were known as the experts to everyone involved in international commercial arbitration. According to one arbitration participant, “arbitration was characterized by a rather limited small group of impeccable outstanding professionals—characters known around the world—whereas today I have difficulty to see the outstanding personality.” Interview #31 at 3. Another participant characterized the senior notables as having “God-like complexes.” See Interview #25 at 5. One of these notables expressed his view of the benefits of notability in terms similar to those used to describe Vance’s role in the Macy’s bankruptcy; he viewed his greater authority as allowing him to more easily convince his co-arbitrators to join him in his judgment of the dispute. See Interview #30 at 6.

A recent account of the appointment of Cyrus Vance as mediator in the bankruptcy proceedings of R.H. Macy & Co. illustrates the importance of the authority of a notable TP. Contrary to normal procedures, the bankruptcy judge appointed Vance as mediator without the request or prior consent of the parties to the proceeding.<sup>78</sup> Vance was brought in to gain the respect and attention of the claimants. According to a bankruptcy lawyer not involved in the case, "Egos needed to be reined in. 'What was needed was someone that everyone has to say, 'Yes sir' to . . . Without somebody like that, you have the question of who's in charge, who's making the most money, who screams the loudest. There won't be any screaming with Mr. Vance.'" <sup>79</sup> A similar comment was made by another outsider to the case:

Inflated egos create the need for an authority figure to impose civility into what has become an uncivil situation . . . . When a mediator is appointed in a multiparty bankruptcy case, the first step is often a "come to Jesus" meeting among all the parties. These meetings usually are different from the multiparty meetings that have preceded them in only one respect. Everyone says "Yes sir" or "Yes ma'am" to the mediator, and the heavyweight bullies from the prior meetings become models of decorum.<sup>80</sup>

The notable's authority is his main attraction; especially in the contemporary climate where civility is not always the norm, the presence of the notable may bring a welcome measure of calm and restraint to the proceedings.

A notable's authority is also related to his impartiality. Most notables work as TPs only occasionally and do not rely on such work in order to make a living.<sup>81</sup> Their authority to act as TP comes in part from this

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<sup>78</sup> "Under the Southern District's standing order, parties are normally allowed to select from a roster of mediators maintained by the court." *Cyrus Vance to Mediate Macy's Bankruptcy; Use of ADR Spreads*, 5 WORLD ARB. AND MEDIATION REP. 101-102 (1994).

<sup>79</sup> Mary Voboril & Edward R. Silverman, *At Macy's, He's Called "Mr. Vance,"* NEWSDAY, Feb. 24, 1994, at 45. According to this article, Vance's firm, Simpson, Thacher & Bartlett, billed about \$1 million in connection with his services as mediator in the Olympia & York bankruptcy. "For Macy's, Vance will earn his customary fee, believed to be about \$500 an hour." *Id.*

<sup>80</sup> Hugh Ray, *Mediators, Egos and Common Courtesy*, TEX. LAW., Mar. 14, 1994, at 22. See also *McEnany v. West Del. County Community Sch. Dist.*, 844 F. Supp. 523, 527 (N.D. Iowa 1994) ("Without acrimony, there would be little need for a mediator.").

<sup>81</sup> This is true for both U.S. and international TPs. See DEZALAY & GARTH, *supra* note 21, at 34 ("For the pioneers of arbitration, exemplified especially, but not only, by very



independence from ADR generally; their notoriety arises because of their non-ADR activities. They do not necessarily offer the expertise of the senior international arbitrators or the QCs, since their investment in dispute resolution may be limited, but they market themselves as independent—and valuable—based in part on their separation from dispute resolution generally.

The notable's claim to impartiality is based on exactly that separation, and the resulting *lack* of need for future ADR business. A notable offers impartiality because he does not need to please either side in the dispute. In the Macy's bankruptcy, some concern was raised about conflicts of interest between Vance and his law firm and the parties involved in the bankruptcy. According to one report, his firm had "advised several of Macy's creditors who were exploring possible bids for the retailer's assets."<sup>82</sup> And Vance personally was a member of an advisory board for Chemical Bank, a major creditor of Macy's. These connections did not cause objection by the major parties involved in the bankruptcy; in fact, the existence of the connections was not reported in most accounts of Vance's appointment. Again, his status as a notable brings him above suspicion regarding his impartiality; it is as if there is no rational basis for him being biased in any direction, due to his personal standing apart from the dispute.<sup>83</sup> As with respect to the barristers and senior arbitrators, the elite nature of the notable is central to the authority to resolve disputes.

### D. *The Judicial Model*

The judicial model is related to the prior ones, but it has the dimension also of official state authority. It includes sitting and former judges who do private ADR work. In most cases, sitting judges may not work simultaneously as TPs in private dispute resolution, but they are included here in part because they set a standard against which TPs compete with regard to authority and impartiality. Judges have the legitimacy of the state behind their actions and are clothed with authority which supports their interpretation of the law.<sup>84</sup> Judges also are bound by a relatively strict code

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senior European professors imbued with the traditional values of the European legal elite, the dominant opinion has been that arbitration should not be a profession: 'Arbitration is a duty, not a career.'").

<sup>82</sup> *Cyrus Vance to Mediate Macy's Bankruptcy; Use of ADR Spreads*, 5 WORLD ARB. & MEDIATION REP. 101-102 (1994).

<sup>83</sup> "Vance filed a 'certificate of disinterestedness' with the court on February 22 stating that he met the criteria required by bankruptcy law." *Id.* at 102.

<sup>84</sup> Judges also participate in making law; the 1980s tender offer contests and cases provide one example of this. *See generally* Yves Dezalay, *Technological Warfare: The Battle*

of ethics which requires them to avoid acting where their "impartiality might reasonably be questioned."<sup>85</sup> Their impartiality is also supported by their freedom from concern about future business. Those who are appointed for life, as are federal judges, are spared, at least in theory, the burden of worrying about how their conduct on the bench will affect their success in being reappointed or obtaining a subsequent job. Even without the guarantee of appointment for life, judges ideally need not worry about attracting business. As a result, they can act with more objectivity and disinterestedness than if they were dependent upon their conduct in one case to determine where the parties would bring their next dispute.<sup>86</sup>

Because most U.S. jurisdictions prohibit sitting judges from acting as

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to Control the Mergers and Acquisition Market in Europe, in PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS 77 (Yves Dezalay & David Sugarman eds., 1995).

For a comparative view of lawyers and judges in the common and civil law systems, see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 154-164 (2d ed. 1994).

<sup>85</sup> ABA MODEL CODE OF JUDICIAL CONDUCT (1990), Canon 3E(1): "A judge shall disqualify himself or herself in a proceeding in which [his or her] impartiality might reasonably be questioned . . . ."

Sitting judges engage in a variety of activities besides deciding cases, some of which are also common to certain ADR processes. For example, judges conduct settlement conferences, pre-trial discovery conferences and rule upon the acceptability of settlement agreements. The ability of judges to maintain impartiality when participating in these sorts of activities has been seriously questioned. See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 427-428 (1982). Resnick writes:

The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received *ex parte* . . . . Moreover, judges are in close contact with attorneys during the course of management. Such interactions may become occasions for the development of intense feelings—admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias.

Further, judges with supervisory obligations may gain stakes in the cases they manage. Their prestige may ride on "efficient" management, as calculated by the speed and number of dispositions.

*Id.* See generally John R. Allison, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135.

<sup>86</sup> See generally Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994). Sitting judges may anticipate leaving the bench before retirement, and this may influence their work on the bench; but this is a relatively recent phenomenon, encouraged somewhat by the popularity of ADR.

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TPs in ADR proceedings, it is not until they leave the bench that judges serve as TPs in most instances.<sup>87</sup> In leaving the bench, judges take some of the prestige of their state connection with them, along with their experience as impartial decision makers. These characteristics are valued in ADR, but even more important is that judges also take with them their pre-judicial status. For many, this pre-judicial status places them among the notables, but with the addition of expertise in decisionmaking resulting from their time on the bench. These TPs may then have the prestige of the notable combined with specific experience in dispute resolution. Not surprisingly, this sort of prestigious former judge is reported to be among the most popular TPs in private dispute resolution. According to an executive at one of the largest American ADR service providers, "[T]he vast majority of the business and the vast majority of the cases are still done in the private sector . . . by former judges."<sup>88</sup>

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<sup>87</sup> In some circumstances, sitting judges may also hire themselves out as private TPs. This practice has been permitted in Sweden for many years, and consequently Swedish "arbitration is 'a judicial way of settling disputes.'" DEZALAY & GARTH, *supra* note 21, at 185 (citation omitted).

The Connecticut legislature initiated a similar practice in 1993, when it authorized judges to work as TPs under the auspices of a nonprofit corporation, Sta-Fed ADR, Inc., offering mediation services. The stated purpose of this organization was to induce judges to remain on the bench instead of resigning or retiring to work in more highly compensated private dispute resolution. Sta-Fed ADR, Inc. required senior judges to maintain a minimum level of work for the court in order to offer ADR services. See Kirk Johnson, *Public Judges as Private Contractors: A Legal Frontier*, N.Y. TIMES, Dec. 10, 1993, at D20.

Both senior federal and state judges were eligible to join Sta-Fed, as were nonjudicial lawyers who were approved by Sta-Fed's board of directors. See Janet Seiberg, *The Clamor Over Sta-Fed*, CONN. L. TRIB., Oct. 11, 1993, at 1. Despite the judges' participation, the reaction to the organization was not unanimously supportive. "Three plaintiff's lawyers . . . say they have little faith in the abilities of most people on the roster." *Id.* Sta-Fed did not attract the number of cases expected; in December 1995, its board of directors voted to close the organization due to lack of demand for its services. See Elaine Song, *The End of the Road for Sta-Fed*, CONN. L. TRIB., Dec. 25, 1995, at 1.

<sup>88</sup> Interview #18 at 26. See also Karen Donovan, *Searching for ADR Stars*, THE NAT'L L.J., Mar. 14, 1994, at A1 ("Ex-judges, who dominate the panels at these [ADR service provider] companies are still the most popular choice, largely because clients want an approximation of what they get in court."). Commenting on the resignation of the presiding judge of the Domestic Relations Division of Cook County Circuit Court to become a partner and head of mediation services at a Chicago matrimonial law firm, another partner at the firm stated that "having the former presiding judge . . . would immediately place his firm at the top of the mediation heap." Eric Herman, *Presiding Judge to Preside Over Mediation at Divorce*

For former judges whose independent status before joining the bench was limited, the experience from judging is the key to their offering of TP services. Former judges, not surprisingly, generally emphasize the similarity of the TP and judicial roles. One former judge commented on his change from a judge to a private TP:

I'm doing exactly what I used to do. There's been no transition at all. Even in the area of mediation as you know the pressure on the judges to move their calendars requires that they bring the parties in with an attempt to settle the case . . . . And the judge is trying to get rid of a trial by settling it before trial and he's a mediator. And you do that all of your judicial life. So you're working on both the arbitration and mediation sides when you're a judge.<sup>89</sup>

In this respect, the former judges may emphasize not only their judicial status, but also their contextual authority as ADR experts. And, of course, once notables, barristers, arbitrators or judges decide, for whatever reason, to commit themselves to the role of the TP, they naturally emphasize their expertise and ability as well as their status.

### E. *The Substantive Expertise Model*

Tps whose services are based upon their experience and knowledge of a particular substantive area, such as securities regulation, family disputes or intellectual property, represent the substantive expertise model. Their expertise assures disputants of an educated—or quickly educable—TP, with regard both to the dispute and to the context of the dispute. The dispute resolution process should be faster, and consequently cheaper (at least insofar as the fees associated with the process are concerned), because of the participation of a TP with substantive expertise, as compared to the time and cost associated with a TP who does not offer substantive expertise.<sup>90</sup> It

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*Firm*, CHICAGO LAW., Nov. 1995, at 68. See also *ESCAPING THE COURTHOUSE*, *supra* note 3, at 51–52 (suggesting that judges do a high proportion of ADR in particular kinds of cases, notably cases where the procedures used resemble judicial procedures, such as settlement conferences and private judging); Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1 (describing the “intense battle among the AAA and its rivals to snag judges and the money they generate.”).

<sup>89</sup> Interview #19 at 21.

<sup>90</sup> Related to TPs with substantive expertise, and as a result of the desire for expertise in a decision maker, some states have adopted special procedures using certain judges for large commercial cases, thereby giving disputants what they otherwise could obtain only by

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is exactly the ability to select such a TP with expertise in the subject in dispute that motivates some disputants to try ADR in the first place.<sup>91</sup> This substantive expertise provides the TP with contextual authority.

Specialization with regard to substance characterizes TPs who are lawyers as well as those who are not. Divorce and child-custody dispute resolution work traditionally has been the focus of nonlawyer mediators, who base their authority in part upon their experience in family problems apart from law.<sup>92</sup> Labor negotiators, too, offer expertise in a particular kind of dispute. Lawyers' specialization in practice lends itself to specialization in ADR work as well, and there have appeared a number of special panels of TPs based upon substantive legal expertise.<sup>93</sup>

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removing their dispute from the court system. *See* sources cited *supra* note 29; S. Gale Dick, *Special Courts Now Handle Business Cases*, 12 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 97, 97, 106 (1994) ("New York, along with Delaware and Illinois, is among the states now experimenting with special court sections to handle business disputes. Commercial courts are either up and running or under consideration in two of the three largest U.S. cities and in jurisdictions covering roughly half the country's population . . . [T]he quality of the judges in the commercial parts received high praise from users of the program.").

*See generally* Hazard & Scott, *supra* note 12, at 50 ("[T]he quest for different and better tribunals of specialized jurisdiction is always political to some extent.").

<sup>91</sup> Comments regarding the ability to select the TP as inducing participation in ADR were couched as complaints both about the quality of the judiciary generally, and about some recent judicial appointees' lack of common background as compared to corporate counsel, leading to the fear "that the judges would be less sympathetic to their concerns." DEZALAY & GARTH, *supra* note 21, at 155. *See also* Peter D. Zeughhauser, *What's in a Name? Plenty*, AM. LAW., Apr. 1996, at 44. Zeughhauser writes:

I had two maxims about litigation that served as the sobering cold water necessary to avoid costly litigation and instead engage in ADR: The first was that litigation is the sport of kings; the second was that the courtroom is a dangerous place. After all, what sober-minded business person wants an important dispute decided by a group of 12 strangers who know nothing about the underlying business much less by a former D.A. who was appointed to the bench because of his or her skill in locking people away for crimes that were more often than not self-evident?

*Id.* at 44.

<sup>92</sup> *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351-1353 (1995); Alison LaCroix, *Taking the Creative Road to Divorce*, BUS. J. MILWAUKEE, July 15, 1995, at 1.

<sup>93</sup> *See, e.g., JAMS Launches Major Environmental Initiative*, 5 WORLD ARB. & MEDIATION REP. 79 (1994); *An ADR Arena Suits Davids and Goliaths*, 12 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 17 (1994) (CPR panel of mediators for franchise disputes);

The experience which supports a TP's substantive expertise might be derived from a number of sources, including law practice, nonlaw professional consulting and course work.<sup>94</sup> These sources of expertise do not necessarily create a community of substantive specialists, as was the case for the QCs, because the accumulation of experience by one TP may not bring her into contact with other TPs offering comparable expertise. The sources of expertise may be too diverse to assure commonality. As a result, the substantive expertise model does not necessarily provide individual TPs with the ability to act as a group with regard to self-regulation or otherwise. That is not to say, however, that such groups may not form.

Similarly, the absence of a common background in the substantive expertise model makes it difficult to predict whether an individual TP will have personal authority. Some TPs whose services are based upon substantive expertise may be relatively marginal in their professional communities, and yet capable of working with the merits of disputes. Others will bring substantial outside reputations to their role as TP. Substantive expertise does not necessarily coincide with personal or political status. Without personal authority, substantive expertise TPs may be so immersed in mindset with the issues of their area of expertise that they lack balance as TPs. Substantive expertise raises the concern of *too* much connection or sympathy with a particular industry or point of view. TPs with personal authority as well as substantive expertise will be motivated to protect their larger reputations, apart from ADR, and this may cause them to avoid succumbing to this influence. But those without personal authority may not be so motivated. In addition, the possibility of industry disputants having repeated disputes, encouraging favoritism in exchange for business, also causes concern here.

The absence of a shared background and community also correlates with an openness to the creation of expertise. For example, greater diversity is possible among the TPs who offer their services based upon substantive expertise than for the self-regulatory elite models.<sup>95</sup>

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*Insurers Agree to Try ADR*, 12 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 18 (announcing the formation of the CPR Insurance Panel). See also Gordon T. Walker, *Big Firms Should Offer More ADR Services*, 21 LITIG. NEWS, Mar. 1996, at 7 ("The ability of large firms to bring true subject matter expertise to the ADR process distinguishes them from many of the profit and non-profit ADR providers.").

<sup>94</sup> Another source for substantive expertise may be ADR itself; for example, the World Intellectual Property Organization was organized to produce rules governing arbitration and mediation of intellectual property disputes, and potential TPs gain a measure of substantive expertise through participation in conferences and activities sponsored by the organization.

<sup>95</sup> Diversity among TPs has generated concern, especially with regard to industry or

## F. Expertise in Method

TPs who define their expertise as involving the *method* of arriving at the resolution of disputes emphasize the uniqueness of ADR methodology and the importance of experience and training in this methodology.<sup>96</sup> They distinguish themselves from others who rely on contextual authority apart from ADR, such as judicial experience. These TPs may be career TPs, and generally favor the professionalization of this role. They offer themselves in contrast to those who serve as TPs only occasionally, by emphasizing their experience as—and the need for expertise in the work of—TPs.

This methodology expertise model is visible along a continuum from those persons who rely upon their expertise as an entrance ticket into the work of ADR, to those for whom this expertise is simply the form around which they structure their participation as TPs. Both groups, as well as

ideological sympathy. See generally *Minority and Women-Owned ADR Firm Opens in San Francisco*, 6 WORLD ARB. & MEDIATION REP. 48 (1995); Dave Thom, *Mid-Market Players Want a Piece of the ADR Pie*, RECORDER, July 26, 1995, at 1 ("Like most of its recently formed competitors, Diverse ADR is targeting a specific segment of the market: customers looking for so-called neutrals with diverse cultural and ethnic backgrounds.").

<sup>96</sup> See, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 323-324 (1994) ("Arbitration . . . asks the arbitrator to replicate the decision of a court. A mediator, by contrast, stops short of recommending how the dispute should be resolved.") (footnotes omitted). Brown and Ayres describe the economic value of mediation by focusing on what they identify as the uniquely "mediative" process of caucusing with disputants. Their analysis supports ascribing value to the expertise of TP work, as it relates to mediation, in terms of the necessity for mediators to understand and negotiate with the disputants their intended use of confidential information during caucuses.

See also Robert D. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model*, 13 MEDIATION Q. 131, 132 (1995) ("Mediation practice is not based as much on a distinct substantive knowledge base as it is on a process and holistic presentation and application of information gleaned from many professional disciplines. Unlike the more traditional professional, mediators are not experts; they help disputing parties gather and apply the expertise of other professionals.").

On mediator training generally, see Alison LaCroix, *Taking the Creative Road to Divorce*, BUS. J. MILWAUKEE, July 15, 1995, at 38 (describing the mediation firm, Out of Court Solutions Inc., which teams mediator-lawyers with therapists); Kate Thomas, *ADR's Regulatory Road Already Well-Traveled by Other States*, TEX. LAW., July 10, 1995, at 1; *New ADR Referrals Only for Attorneys*, MASS. LAW. WKLY., July 17, 1995, at 14 (According to Susan Podziba of SPIDR, "30 hours of mediation training . . . is insufficient to turn attorneys into mediators . . . 'Mediation and ADR are completely different from advocacy.'").

those in between, typically define themselves as specialists in the art of mediation. They emphasize their skills in listening, translating and deal making; but for the former group, this emphasis begins and ends the discussion, while for the latter group, it is only one part of their offering.

For the former group, methodology expertise defines their offering, or "capital." One example of this is found in the family dispute area, where mediators who are trained in psychology or social work focus upon the role of TP as directed towards the marital relationship, with the goal of transforming the relationship from conflict to cooperation.<sup>97</sup> One mediator described his role as "hearing and interpreting what the parties are saying."<sup>98</sup> These mediators view themselves not as monopolizing the dispute discussions, but rather as facilitating the parties' conversation; unlike Cyrus Vance in the Macy's dispute, their reputations are not used to tame the disputants' egos. Rather, they view the best resolution as one which originates with the parties themselves. "The mediator is the least-important person in the room . . . It's the parties involved that matter."<sup>99</sup> The success of the process is tied to its effect on the disputants' relationship.

It is possible, although still relatively unusual, for a TP specialist to become a big name mediator with the stature of a notable. Kenneth Feinberg provides an example of this. Mr. Feinberg was formerly a member of the prestigious law firm, Kaye, Scholer, Fierman, Hays & Handler, which he left to establish his own mediation firm, Kenneth R. Feinberg & Associates. He has been involved in several large tort cases, including the Agent Orange litigation. He recently established an ADR education firm, Mediate, Inc., which will "educate U.S. executives . . . about the nature, advantages, limitations, and dynamics of alternative dispute resolution."<sup>100</sup> Feinberg is identified with the methodology expertise model as a result of his commitment to, and identification with, mediation and other alternatives

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<sup>97</sup> See Michael Benjamin & Howard H. Irving, *Research in Family Mediation: Review and Implications*, 13 *MEDIATION Q.* 53, 69 (1995). Law trained mediators, on the other hand, may view their goal as TP as simply producing a settlement to the divorce dispute.

<sup>98</sup> William C. Smith, *Alternative Dispute Resolution: From Buzzwords to Business*, PA. L.J., Nov. 6, 1995, at 54 (quoting Edward Pereles, Philadelphia labor arbitrator and mediator).

<sup>99</sup> Katie Brown, *Retreat From Courtroom Battles Made Phillips Mediation Pioneer*, S.F. BUS. TIMES, May 30, 1988, at 12 (quoting Barbara Phillips). A mediator who specializes in a particular type of commercial dispute characterized her role in similar terms: "Mediation is about listening, giving the parties a sense of control over the problem." Interview #2 at 4.

<sup>100</sup> *Feinberg Launches Educational and Training Firm*, 5 *WORLD ARB. & MEDIATION REP.* 210, 210 (1994).



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to litigation, but he offers a different variety from the family mediators. Not surprisingly, he emphasizes reputation as important for effectiveness in mediation, as opposed to simply emphasizing mediation techniques. For example, he has advocated the use of a "well-known person, someone with presence, political connections and a weighty reputation" for large or political disputes, urging that ability in mediation methodology is necessary but insufficient in such cases.<sup>101</sup> We thus see how notability and expertise can blend in the elite of those who commit themselves to practice as TPs.

Those who emphasize methodology—wherever they come from—tend to agree on the uniqueness of the skills of a good mediator, as opposed to the skills of a good litigator, arbitrator, judge or lawyer.<sup>102</sup> According to a

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<sup>101</sup> Kenneth R. Feinberg, *Baseball Mediation: Get a Power Hitter*, N.Y. TIMES, Aug. 21, 1994, § 3, at 9. Similarly, Elizabeth Rolph, Erik Moller and Laura Petersen found that "more than half of all neutrals see fewer than 10 disputes annually, while less than 10 percent of the neutrals see more than half of the disputes." *ESCAPING THE COURTHOUSE*, *supra* note 3, at 49.

Another example of the big name methodology specialist might be former President Jimmy Carter, who, when asked about the difference between conflict resolution between nations and between individuals, said, "I don't think there's any difference in the principles involved . . . . Even in arguments between two kids on the school grounds, or between a husband and a wife that led to divorce, or a war between two nations . . . ." Kristiana Helmick, *For a Spat or War, Who Ya Gonna Call? Feudbusters*, CHRISTIAN SCI. MONITOR, June 7, 1995, at 1.

<sup>102</sup> See Brown, *supra* note 99, at 12 (quoting San Francisco mediator Barbara Phillips, president of American Intermediation Service) ("A good mediator must have good judgment, compassion, intelligence and experience—the wisdom that comes through experience. The best mediators are deeply grounded people with a lot of personal ballast and a lot of depth. They cannot become part of the problem, they have to be impervious to it."). But see Jacques Werner, *ADR: Will European Brains Be Set On Fire?*, 10 J. INT'L ARB. 45 (1993) (urging that ADR does not include any ideas new to the existing methods of resolving disputes).

Not all methodology specialist TPs are mediators. In international commercial arbitration, the younger generation of arbitrators viewed themselves as more fully committed to the role of arbitration participant than the older generation, who viewed arbitration not as a career but as a duty. See Interview #22 at 3. As one member of the younger generation commented:

I think it's bad for international arbitration for people to approach it in an amateurish way. That doesn't mean that the only people who should ever be arbitrators are those that have a lot of experience. . . . But there are far too many people who consider that becoming an arbitrator is part of the things that happen to you when you become a senior respected lawyer.

mediator at an ADR services firm, "the skills [of a judge] are absolutely transferable as an arbitrator; not necessarily as a mediator . . . . They are radically different procedures, they have enormously different legal effects, and the skills are different."<sup>103</sup> Another mediator-lawyer who advocates the art of mediation described his initial thinking about mediation as "basically . . . the arbitrator wearing a nonbinding hat and getting settlements by telling people . . . how the arbitrator would decide the case if the case were real."<sup>104</sup> That same mediator now sees himself as aligned with "folks who tend to resolve disputes by reconciled interests and they might be called the deal makers . . . . whose stock in trade is I can help you because I know how to make deals."<sup>105</sup>

Expertise in methodology can be learned, and this model of TP emphasizes the importance of training in ADR techniques.<sup>106</sup> This emphasis is also a competitive tool that permits entry into the work of TPs by those whose prior experience and status would not otherwise provide them a way into the work. Those who complete training and market their services as TPs solely on the basis of their methodology training may lack personal authority; the TP may have no other "platform" from which to market his

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Interview #29 at 52.

<sup>103</sup> Interview #18 at 7. See also Donovan, *supra* note 88, at A1. Donovan also had reservations about a judicial approach to ADR:

[L]awyers, who are among the biggest purchasers of mediation services, have discovered that a judicial perspective is not necessarily the best buy in ADR. Tactics that make a judge successful in settling cases from the bench are often ill-suited to and quite different from the friendly persuasion that is key to successful mediation.

*Id.* Similarly, a British solicitor commented on the differences between arbitrators and mediators: "Sometimes arbitrators are not suited for mediators and a certain type of arbitrator would not make a good mediator. They are too used to sitting back and hearing evidence rather than working with the people towards . . . a solution that will settle their differences."

Interview #26 at 26.

<sup>104</sup> Interview #21 at 1.

<sup>105</sup> Interview #21 at 14.

<sup>106</sup> However, some believe that good mediators are born, not trained. See Donovan, *supra* note 88, at A1 (quoting John Bates).

On training generally, Tom McDonald's comments are instructive: "A societal need exists for all kinds of mediators whether they have a law license, a terminal degree or have never attained a higher education, but each one *needs to be properly trained* and required to abide by ethical standards as a matter of public policy." Tom McDonald, *Finding a Win-Win Solution: The Credentialing Conflict Between Attorney and Non-Attorney Mediators Threatens to Undermine the ADR Movement*, TEX. LAW., Mar. 4, 1996, at 15.

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services.<sup>107</sup> A corollary of this absence of personal authority is the tendency towards TP work as a career, rather than as an activity ancillary to a central—or at least earlier—career outside of ADR.

This distinction between career TPs and those who serve as TPs only occasionally can be a dividing line for many ADR participants.<sup>108</sup> In international commercial arbitration, the senior arbitrators viewed their occasional participation as ideal and supportive of their impartiality. As one American participant in the international arbitration community commented:

I'm old fashioned. I think that the person who goes into this business as an arbitrator to make a living should not be encouraged. To me, the concept of international arbitration is to take someone who is busy, who's not doing this full-time . . . I get nervous about full-time arbitrators, because to me they become too beholden either to the ICC or to parties to appoint them or whatever it is. So I like truly independent people who are not doing this for a living.<sup>109</sup>

These same concerns are relevant to the career TP in the United States, who may be influenced by the promise of future business or induced to favor a repeat-player party more easily than a TP whose major career commitment lies elsewhere, because this TP must attract business for her livelihood. On the other hand, the career TP must be watchful to maintain a reputation of integrity in order to support her career; one might argue that the career TP has more reason to guard her impartiality—as well as her image of impartiality—than the occasional TP, who need not rely on this image for support. Indeed, one lawyer articulated the desire to select a career TP on the basis of his “stronger financial incentive to be better, ‘whereas a retired judge goes back for another round of golf.’”<sup>110</sup> Both career TPs and distinguished amateurs have their proponents. As ADR expands, however, the number and prominence of full time TPs can be expected to increase. Notables in heavy demand may respond to that demand by committing themselves more fully to ADR.

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<sup>107</sup> The comments of an international arbitration participant are relevant here: “You can’t get into the game at all unless you’ve got a platform. You can’t just sort of say, I would really like to be an arbitrator or a counsel for a party in large arbitrations.” Interview #13 at 16.

<sup>108</sup> As a practical matter, however, most TPs cannot generate enough business to support themselves without an ancillary career. *See, e.g.*, Helmick, *supra* note 101, at 1.

<sup>109</sup> Interview #23 at 19.

<sup>110</sup> According to a senior litigation counsel at Motorola, Inc., “Panel mediators cannot be as good as someone who does it every day.” Donovan, *supra* note 88, at A1.

## IV. OUTLINES FOR REGULATION

These six models provide the basis for analyzing the quality—that is, the authority and impartiality—of TPs, which in turn is the basis for creating an analytical approach to regulation of TPs. The models may appear as discrete categories, each with its own version of quality. In reality, the models appear mainly in comparison to each other, and the quality offered by one model is best assessed in relation to the characteristics of other participants in the dispute resolution market. The categories may change as demand for ADR increases; competition may result in one model taking on some of the characteristics of another. As ADR becomes more widely accepted, certain basic knowledge may be required for every entry into the TP market; disputants may come to expect all TPs to be capable of serving a variety of roles, which may require TPs to complete some sort of basic training before offering their services. The nature of the offering is also changing in terms of the timing of the TP's entry; the current focus on *early* dispute identification and resolution may add to the mix of TPs now offering their services.<sup>111</sup> This fluidity is difficult to capture in the description of the models, but it is essential to an accurate consideration of the current field of ADR.

In light of these qualifying comments, we return in this section to the examples of TPs described in the introduction—the notable TP, the former judge serving as TP, and the securities industry specialist—to examine them in light of the models and the principles of authority and impartiality, and to indicate the direction regulation of these TPs might take.

The first example of a particular kind of TP was Cyrus Vance's role in the Macy's bankruptcy. Vance is the epitome of the notable TP. He was appointed for his authority—his ability to control the parties and their lawyers—rather than for his technical ADR skill. The notable generally gains notoriety outside of dispute resolution work, as did Vance; unlike the QCs and senior international arbitrators, selection of a notable is not necessarily motivated by his reputation in ADR. As a result of this emphasis on status, the notable may lack the experience which defines contextual authority to act as TP.

The risk of a notable serving as TP in a situation in which he lacks the experience and knowledge necessary to guide his conduct as TP, however,

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<sup>111</sup> See, e.g., Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV., May-June 1994, at 120, 130 (reporting on NCR's use of ADR to "report, analyze, address, and resolve . . . [disputes] before they can fester into litigation.").

is relatively small. The notable's conduct, in ADR and otherwise, is guided by his intent to preserve and foster his reputation, both with respect to his role in ADR and generally. This interest will cause the notable to self-regulate and restrict his participation to situations in which he can be sure that his services will be appropriate. As a result, requiring special training for notable TPs in order for them to do ADR work may be unnecessary because we can rely upon the notables to obtain the training necessary to enhance their reputations for such work. In the Macy's dispute, it would not have been useful to reject Vance as TP simply because he had not received particular training in ADR techniques. His status as an authority figure was the attraction for the disputants, and his experience as a negotiator was sufficient in those circumstances.

Apart from authority, the notable must also give assurance of his impartiality in order to satisfy concerns about quality. Again, the notable's interest in protecting his reputation will lead him in the right direction; as with contextual authority, we can expect the notable to self-regulate against bias. But this self-regulation for notables occurs only on an individual basis. The group of core arbitrators and QCs, in contrast, regulated one another as well as themselves, providing an additional layer of censorship to obtain impartiality. This group impact is absent in the notable model—there is no community of notables, they do not necessarily know one another, work together or select each other for ADR work. Almost by definition, the number of notables who can be counted on for this kind of assignment is very small. While self-regulation with regard to contextual authority is acceptable, in the case of impartiality it is riskier, since the benefit possibly gained by a favored disputant may result in that disputant misinforming others regarding the TP's conduct.

The notable's status, however, brings with it a certain degree of public attention.<sup>112</sup> In the Macy's bankruptcy, Vance's relationships to claimants, individually and through his law firm, were disclosed in the press, albeit not widely. The possibility of media attention helps to ensure that conflicts are exposed, not only through investigative reporting but also by the notable as a result of the *threat* of such reporting. Consequently, the fact that a TP is a notable, who will attract media attention or thinks he will attract media attention, gives some measure of assurance to disputants as to the TP's willingness to disclose conflicts of interest.<sup>113</sup> So long as the notable is

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<sup>112</sup> Of course the problem of defining notable—including a definition which includes press attention—remains.

<sup>113</sup> International arbitration insider comments include:

[The arbitrators] I like the most I wouldn't for an instant harbor the suspicion that they will lean my way because they will be reappointed . . . . [T]he ones I really respect I

subject to general disclosure obligations regarding specific relationships to the disputants and their representatives, actual or threatened press coverage will likely cause the disclosure of other relevant information. Again, however, it is clear that the number of persons with this kind of notability will be very small.

The senior core arbitrators present a similar and contrasting story to the notable model. In some sense, the senior arbitrators are also notables; certainly to the average disputant, the senior arbitrators would be selected on the basis of their status in the world of international commercial arbitration, as well as because of their expertise. In terms of notoriety outside of the world of dispute resolution, some of these senior arbitrators would attract the sort of media attention characteristic of the notables, but such attention would not be assured in every case.<sup>114</sup>

Media attention is replaced (or perhaps supplemented) by a self-regulating community in the senior arbitrator model. The relatively small size of the group of senior arbitrators—although larger than the number of public figure notables—combined with their activities at conferences, in scholarship and in cases, can create a sensitive market in information about the group's members. Such a market has provided information about arbitrators which enabled the appointment process to function smoothly. Because the arbitral system is confidential, it is difficult for business people to gather sufficient information about potential arbitrators to confidently choose a good candidate.<sup>115</sup> Yet one of the main attractions of arbitration is

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don't deceive myself for one second because I've been in cases where I've lost. Where these same people huddled against me and I'm still interested in appointing them. But I was convinced by their award.

Interview #27 at 25. "[O]ne has to watch out that counsel is not selecting the same person. Because otherwise . . . you get into a situation where it rightly or wrongly could be conceived as a relationship which could give rise to problems." Interview #28 at 10. "[Y]our reputation may be influenced by [repeated appointments by one party]." Interview #29 at 23.

You will sometimes have parties that . . . put forward someone who is clearly not independent. And he may or may not qualify his statement of independence. We'll send it out to the other [side] and say what do you think . . . Do you object or do you accept this person. And quite often they'll accept. . . I think partly reasoning that this man is so tarnished from the beginning and everyone knows that, that he is never going to carry any weight with the other two arbitrators.

Interview #30 at 11.

<sup>114</sup> For an example of media attention focused on an international arbitrator who is clearly also a notable, see Jeremy Edwards, *The Five-Million Pound Man*, *LEGAL BUS.*, Apr. 1994, at 51 (discussing international arbitrator Pierre Lalive).

<sup>115</sup> According to a participant in international arbitration, "No one knows exactly how

the ability to choose the decisionmaker.<sup>116</sup> The job of suggesting appropriate arbitrators often falls to a business client's lawyer, and if that lawyer is an insider to the world of arbitration,<sup>117</sup> the client is on its way to appointing a good arbitrator.<sup>118</sup>

The market in information about arbitrators not only provided positive guidance about appointment of TPs, it also provided information about who *not* to appoint.<sup>119</sup> While there are stories about arbitrators who favored one

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an outsider can appraise the quality of certain performers in this game . . . . It's almost designed to prevent them from being able to make any objective judgment . . . . I mean the only people who really know, are the people in the field." Interview #9 at 15-16.

<sup>116</sup> As a prominent international arbitrator said, "[One] is appointed as a party arbitrator presumably because one is thought likely to be receptive to their arguments." Interview #10 at 12.

<sup>117</sup> As one arbitrator commented:

And when we are called upon either as counsel, which occasionally happens to me, or co-arbitrator to give advice on either an arbitrator or the chairman, on the whole we don't make real mistakes . . . . But I will call two or three people whom I trust and I would say, well I don't know so and so very well, what can you tell me about him. And then once you've called two or three people, with your own knowledge, you . . . will find that you know . . . you get the feeling of who is who.

Interview #11 at 2.

<sup>118</sup> The client's position was well described by one international participant:

If the party to the arbitration is what I call a sophisticated buyer of legal services, they will know who to hire as lawyers. And they will know who to appoint as arbitrators. And if they are themselves not a sophisticated buyer of legal services but engage a sophisticated buyer of legal services or sophisticated law firms to help them, they will become a sophisticated buyer of legal services.

Interview #9 at 15. This same informant spoke of a client who did not know enough to retain a sophisticated law firm, but it obtained a sophisticated engineering firm which managed the case and retained sophisticated legal counsel. *See id.*

*But see* Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. HUM. RTS. 1, 1-2 (1994) (discussing the U.S. ADR world without regard to this ability of and need for insiders to help select TPs).

<sup>119</sup> As a member of the arbitration network commented, "[I]f your reputation for integrity is damaged . . . I would have to think very hard the next time about suggesting that person as a possible arbitrator because that, that gets around very, very quickly, somebody is damaged goods." Interview #7 at 21.

Similar information exchanges occur on a local small-scale basis in very different contexts. For example, in a recent report about a mediation program at a Chicago hospital, a

side with private communications or other partisan conduct,<sup>120</sup> the core group of senior arbitrators were not subject to serious criticism in this regard. They held their reputations above financial incentives, even though they clearly profited from their work. According to one lawyer who has participated in international arbitration, "The egos of the arbitrators are too big to be bought or they're too sincere, to say it more kindly."<sup>121</sup> The controlling factor was self-selection—the members of this elite group of arbitrators recommended and appointed each other, and the parties to the disputes accepted their control, so long as they were assured of a fair chance to present their case; consequently, the appointment process was kept

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plaintiff's lawyer was selecting a mediator from a list approved by the hospital and "discussed with other lawyers the names of all defense attorneys on the roster. 'Of those on the list, I was told to avoid two attorneys,' Ashbell said. In their views, the defendants can do nothing wrong." Carol McHugh Sanders, *Rush Pres—St. Luke's Hopes Its Mediation Program is Contagious*, CHIC. LAW., Apr. 1996, at 43.

<sup>120</sup> The arbitration between Aramco and the Saudi government over oil rights in the Buraimi Oasis is an example of arbitration allegedly interrupted by attempted bribery. See J.B. KELLY, *ARABIA, THE GULF AND THE WEST* 71-73 (1980). See generally DEZALAY & GARTH, *supra* note 21, at 81-85. See also Lawrence F. Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, 3 AM. REV. INT'L ARB. 177, 179 (1992) (giving an example of failure to disclose relationships by an international commercial arbitrator).

<sup>121</sup> Interview #17 at 10-11. The core group of senior arbitrators considered the arbitrator-advocate a second class citizen, at best. The comments of Pierre Lalive, a senior European arbitrator-scholar, at an ICC conference directed to the issue of independence, are relevant:

I would like to propose to include arbitrator independence, within a synthetic definition, objective and subjective at the same time, as implying the independence from situation on one side, and the independence of spirit on the other side . . . [I]ndependence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator.

Lalive, *supra* note 28, at 121. Another European arbitration participant commented:

If you appoint someone who you think will act as an advocate for you, you make an enormous mistake. If you appoint, as the developing countries do, somebody simply because you know he will vote for you, people have no influence at all. It is always better to appoint a competent lawyer to whom the chairman will listen, rather than a friend.

Interview #16 at 2. See also Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59 (1995).



outside of a pure win-lose orientation.<sup>122</sup> Through their control of the market, the core arbitrators freed themselves from significant partisan influence from the disputants.<sup>123</sup>

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<sup>122</sup> It is outside the scope of this article to bring the story of the elite international arbitrators to the present, but it should be noted that their monopoly has been challenged. See generally DEZALAY & GARTH, *supra* note 21, ch. 13.

Information about potential arbitrators also often is solicited from the nominees themselves, through disclosure statements required by most arbitral institutions. The ICC requires such information in its statement of independence, but not all nominees provide the information willingly; Lawrence Ebb reports that in a case in which he served as counsel, the arbitral institution

asked him [the nominee] to set out . . . the details of any possible financial or economic relationships he might have had during the preceding ten years with the defendant company or with a specified group of companies . . . . He adamantly refused to declare whether any such linkage existed or had ever existed, stating that he did not understand the questions and urging the organization to accept as a satisfactory and complete declaration his *ipse dixit* that he had a general reputation for independence. Nevertheless, independent inquiry revealed that he had been a member of the board of directors of not one but two companies wholly owned by the parent company that also wholly owned the other party.

Ebb, *supra* note 120, at 179. On the ICC's statement of independence generally, see Stephen Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 ARB. INT'L 300 (1988); Andreas F. Lowenfeld, *An Arbitrator's Declaration of Independence*, 2 BULL. OF THE SWISS ARB. ASS'N 85 (1991).

<sup>123</sup> The QCs occupy a slightly different position with regard to issues of partiality because of their relationship to one another. Barristers may not form partnerships with other barristers, with solicitors or with other professionals. See John Kendall, *Barristers, Independence and Disclosure*, 8 ARB. INT'L 287, 287-288 (1992). This image of isolation has been carried over into the matter of relationships and bias, so that barristers are generally presumed impartial because of the legal barriers to their formal relationships. Of course, this image of independence derived from the regulation of barristers' practice does not necessarily guarantee impartiality. See Jeremy Edwards, *Inns and Outs*, LEGAL BUS., Nov. 1993, at 60-64; Kendall, *supra*, at 287-288.

Even though barristers are prohibited from practicing in partnership with one another, they do work in sets of offices; yet, this sharing of chambers has not given rise to a presumption of bias. See *id.* at 288. John Kendall comments:

Not unnaturally, those who are unfamiliar with the way barristers operate assume that conflicts of interest can arise in barristers' chambers in the same way as in solicitors' firms. This is not so . . . . The [Bar's] code [of conduct, para. 504(b)] does not mention in this context [requiring a barrister to cease to act in a matter] membership of the same

The idea of a community of TPs might also be characteristic of certain segments of the market represented by the technical expertise model. This model is based upon a certain expertise that might be gained from shared experience, such as formal education programs. A formal training or general education program provides the ability to select the participants, permits them to become acquainted with one another and might form the basis for subsequent continued contact and mutual influence. Although the data informing the models does not provide an example of such a structured group, regulation could create this structure in furtherance of the goal of impartiality.

Like the senior arbitrators, the judicial model TP also presents a relative notable, where status is part of the attraction for disputants, and

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chambers as another barrister working on the same case.

*Id.* at 288-289.

Regarding U.S. lawyers sharing office space and the application of the conflict of interest rules to them, see Arthur Garwin, *Suite Harmony: Protecting Client Confidentiality While You Share Space*, A.B.A. J., Mar. 1992, at 88 (noting that Illinois State Bar Assoc. Opinion 783 (June 28, 1982) considers office sharing equivalent to affiliation, so lawyers who share office space cannot represent adverse parties).

Barristers from the same chambers have been involved in cases on opposite sides, or as advocate and arbitrator, and when challenged on grounds of bias resulting from these relationships, courts have consistently considered the relationship resulting from shared chambers insufficient to annul or reverse an arbitrator's action, regardless of the disputants' knowledge of the relationship. See Kendall, *supra*. But see Stephen R. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 ARB. INT'L 300, 308 (1988). Bond notes:

Nominees [for arbitrator] have also been refused confirmation in instances where the nominee had professional ties to a party's counsel, i.e., acted on their behalf. In one case a prospective arbitrator who was a QC had been retained by defendant's counsel to plead a matter unrelated to the arbitration and the opposing party objected.

*Id.*

The concern here is the relation between barrister and solicitor, which is more akin to lawyer-client. It is an issue not of bias towards a particular party or ideology, but rather influence stemming from the identity and credibility of a party's representative. There has been some effort towards general disclosure of the possibility of a relationship among QCs involved in an arbitration. Several QCs have responded to the challenges by inserting an explanation of their independence and position in marketing materials. See Kendall, *supra*, at 298.

Disclosure, however, does not supply a basis for challenging the relationship in a particular case. Yet perhaps this influence is no more threatening to a TP's impartiality than the influence on a court of a prestigious attorney's participation in litigation.

## MODELS OF QUALITY FOR THIRD PARTIES IN ADR

experience in dispute resolution also motivates the selection. The judicial model TP lacks the self-regulating community of the senior arbitrators as well as the media attention of the notable. Furthermore, the status or personal authority of those represented by the judicial model also is less consistent than the senior arbitrators or notables. While some element of personal authority may be present in the judicial model, and it is clear that former judicial status is attractive to disputants, the former judge's investment in reputation is not necessarily sufficient to satisfy concern about impartiality. Given the lack of assured publicity and the absence of a community for group regulation, the current system of ADR relies entirely upon the individual TP to regulate himself with regard to impartiality. As more TPs move into ADR as a career, the risk of bias from promised future business, coupled with the confidentiality characteristic of ADR generally, combine to undermine confidence in the effectiveness of individual self-regulation as the only mechanism available for assuring impartiality.

A regulatory approach to the former judge TP should take into consideration the relative personal authority characteristic of the model, meaning that the TP's conduct will be motivated, at least in part, to nurture his reputation. In order to connect that motivation with the TP's conduct in ADR, it must be related to his success as a TP. Such a connection can be accomplished in a number of ways. For example, members of this judicial model could join together to offer their services and provide information about themselves to disputants. They could, in effect, create a community similar to that of the international senior arbitrators, including advising disputants about selecting TPs who are members of the community.<sup>124</sup> The community might be housed in an organization formed specifically for that purpose, or it might be based within an ADR service provider firm which specializes in offering former judges as TPs. This approach capitalizes on the existence and value of personal authority.

Substantive expertise TPs, such as the third example of securities arbitrators, do not necessarily possess personal authority. Unlike the models discussed so far, which are all characterized at least in part by personal authority, the substantive expertise model is identified with expertise in the merits of the dispute. There may be TPs who fit within this model who also possess personal authority, even notoriety, with regard to the group of persons specializing in the particular substantive area. But the main attraction of these TPs is their knowledge and understanding of the merits of

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<sup>124</sup> Creating informed disputants may encourage resolution of conflicts. See generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 522-527 (1994) (discussing the utility of a market for information about lawyers' reputations for cooperation).

the dispute, and the advantages in terms of time savings and consequent costs associated with that expertise.<sup>125</sup>

The substantive expertise of these TPs raises the concern that their expertise will bring with it an alignment with a particular position within the substantive area, or simply a general sympathy to an industry position. Repeated representation of or participation within a particular industry may influence the intellectual independence of a TP at the same time that it provides insight. The risk of bias is bolstered by the secrecy generally surrounding ADR, which causes concern that the TP's sympathy will be hidden from the disputants.<sup>126</sup> Furthermore, when industry arbitrators are career TPs, their repetitive involvement in such disputes raises the concern that the TP will favor the repeat party in order to secure future ADR business.<sup>127</sup>

These concerns about partiality are evident in the current securities industry arbitration system. Securities arbitration is generally handled by industry organizations, such as the National Association of Securities Dealers (NASD), the self-regulatory organization for the brokerage industry. In NASD administered proceedings, the NASD Director of Arbitration appoints the arbitrators; the sole arbitrator or a majority of the panel must not be "from the securities industry," and, if there is a panel of arbitrators, a minority may be from the industry.<sup>128</sup> The securities industry

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<sup>125</sup> See, e.g., Arthur V. Pearson, *ADR in Application*, RECORDER, Mar. 13, 1996, at 8 (urging the benefits of ADR for accounting malpractice disputes). Pearson notes:

ADR in this area provides helpful options for parties in dispute. These options all have a common advantage: the ability to obtain a mediator or arbitrator who has knowledge and experience in taxation or accounting standards such that they can use their expertise to bring some clarity to the tax or accounting issues being argued.

*Id.*

<sup>126</sup> Securities arbitration awards are publicly available. See NATIONAL ASS'N OF SECURITIES DEALERS, INC., NASD MANUAL 1991, CODE OF ARBITRATION PROCEDURE § 41(f) (1991) [hereinafter NASD MANUAL]. But settlements of securities disputes are not uniformly required to be disclosed. See Floyd Norris, *What To Do About Broker Arbitrations?*, N.Y. TIMES, Jan. 23, 1996, at D1.

<sup>127</sup> This risk may increase if the recommendations of the Task Force on securities arbitration are adopted, which will encourage professionalization of the role of arbitrator as well as increase compensation for securities arbitrators. See REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., SECURITIES ARBITRATION REFORM (1996) [hereinafter *Task Force Report*].

<sup>128</sup> See generally NASD MANUAL, *supra* note 126, §§ 13, 19; Linda D. Fienberg & Matthew S. Yeo, *The NASD Securities Arbitration Report: A View from the Inside*, INSIGHTS:

supports the system of specialist arbitration; ease of enforcement and industry subsidization of the cost of arbitration are offered as justifications.<sup>129</sup> Others, however, urge that the industry's control of arbitration negatively impacts upon the fairness of the process. According to Representative Edward-Markey, "Christians had a better chance against the lions than many investors and employees will have in the climate being created' now."<sup>130</sup>

TPs in securities arbitration are either formally connected to the industry or are specialists in securities matters. Those who are formally connected to the industry, for example through employment, may favor the position of the industry party to the dispute or, at a minimum, act as an advocate for the industry disputant. Even without evidence of partiality or advocacy, the connection of industry TPs to the securities industry, coupled with their selection by the NASD, presents an image of partiality towards an industry disputant that may be impossible to overcome.

The "public" arbitrators also may have difficulty satisfying the concern for impartiality. These public arbitrators are not directly employed within the industry but may be lawyers or academics who specialize in securities law matters.<sup>131</sup> Their training and expertise in securities issues raise the

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THE CORPORATE & SECURITIES LAW ADVISOR, Apr. 1996, at 7. The sense of unfairness characterizing securities arbitration results from the NASD's appointment power as well as from the characteristics of the industry arbitrators.

The recent task force studying the securities arbitration system recommended using a list procedure for arbitrator selection, which would decrease the NASD's control over appointments; this change would address part of the concern that industry control prevents a level playing field. See *Task Force Report, supra* note 127, at 94-96; *Arbitration Task Force Issues 70 Recommendations in Largest Revamping of Securities Arbitration Since Its Start More Than a Century Ago*, PR NEWSWIRE, Jan. 22, 1996 (available in Lexis/Nexis database: NEWS library; PRNEWS file); Rachel Witmer, *Panel Recommends, NASD to Consider Reforms to Securities Arbitration System*, 28 SEC. REG. & L. REP. 104 (BNA) (1996).

<sup>129</sup> See Susan Antilla, *Brokerage Firms Steer Dissatisfied Customers Away From Court, but in Only One Direction*, N.Y. TIMES, May 12, 1995, at A29.

<sup>130</sup> Margaret A. Jacobs & Michael Siconolfi, *Losing Battles: Investors Fare Poorly Fighting Wall Street*, WALL ST. J., Feb. 8, 1995, at A1. See Barbara Presley Noble, *At Work: Attacking Compulsory Arbitration*, N.Y. TIMES, Jan. 15, 1995, § 3, at 21 ("Those with grievances and their representatives say the industry picks its arbitrators from a Wall Street 'old boy' network that is especially unlikely to look favorably on discrimination claims, requires little-to-no knowledge of employment law, conducts its operations in secret and explicitly tells its mediators they neither have to follow the law nor explain their decisions."). See generally Hazard & Scott, *supra* note 12, at 50-51 (discussing the inherent problems of specialized tribunals).

<sup>131</sup> The Code of Arbitration Procedure defines arbitrators as either from the industry or

possibility of industry sympathy. If these public arbitrators become career TPs, their repeated exposure to the issues raised in industry disputes may make them jaded, particularly towards naive investors.<sup>132</sup> And although the lure of future business cannot directly influence a TP, because TPs are selected by the NASD, the NASD is an industry organization and investors may worry that it is unlikely to repeatedly appoint TPs who rule against industry parties. The comments of a lawyer with experience in securities arbitration are apt: "The arbitrators who awarded nothing . . . tended to be those with close ties to the securities industry—or those who were career arbitrators so dependent on their income from arbitration cases that they could not afford to alienate securities firms by ruling in favor of customers."<sup>133</sup> The combination of substantive expertise and full time work as a TP may be overwhelming to impartiality.

The difficulty in addressing the concern about impartiality in this situation stems from the fact that the attraction of industry specialists—their expertise in the substantive area—is also the cause for concern. In order to eliminate the risk of bias, the advantages of specialization would also be eliminated.

Restating the problem in terms of authority provides insight into an appropriate regulatory approach. The substantive expertise TP assures disputants of contextual authority but not necessarily personal authority, and as a result, there is concern that the TP's identity with the industry and her need for future business derived from that industry may overly influence her conduct. The TP's investment in her reputation may be insufficient to guide her conduct towards impartiality.<sup>134</sup> Regulation must address the risks

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not. The definition, found in section 19(c) of the Code, identifies as industry arbitrators those who are employed by members of the NASD or other broker-dealers, persons who were employed by such organizations, as well as an attorney, accountant or other professional "who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years." NASD MANUAL, *supra* note 126, § 19(c)(5). See *Task Force Report*, *supra* note 127, at 96-97 (discussing the distinction between industry and public arbitration).

<sup>132</sup> Jacobs and Siconolfi comment: "[I]nvestor lawyers contend that too many arbitrators are 'jaded, impatient and overused,' as attorney Seth Lipner says . . . The National Association of Securities Dealers, which administers more than 80% of the claims, admits that some arbitrators were used too often in 1993 after it imposed a minimum-training requirement and the number of arbitrators plunged." Jacobs & Siconolfi, *supra* note 130, at A1.

<sup>133</sup> Scot J. Paltow, *An Arbitrary Process?*, L.A. TIMES, July 16, 1995, at D1 (quoting lawyer Stuart C. Goldberg). See also Jacobs & Siconolfi, *supra* note 130.

<sup>134</sup> Labor cases submitted to ADR are sometimes published, and it has been reported that labor TPs carefully select the decisions they publish to present a picture of balance between cases favoring management and cases favoring labor. Labor lawyers typically

resulting from this absence of personal authority.

We could regulate securities industry arbitration to permit only TPs who possess personal authority to participate. This regulation might be accomplished by creating a public organization to conduct securities arbitration, providing those associated with it official sanction, or by restricting entry into the work of the securities TP to those with independent status. These proposals would result in a very limited number of TPs being available, however, and the large number of securities disputes generated by the current regulatory system would be frustrated by this limitation.

The risks associated with the absence of personal authority also can be addressed by a combination of disclosure and certification. Disclosure creates information for disputants at the same time that it enables TPs to invest in their reputations—disclosure encourages the reputation to be built. If a TP's reputation is assessable by those who control the appointment process, the TP will be motivated to nurture her reputation. Transparency will cause the TP to guard her reputation for impartiality because information indicating favoritism will cause consumers who are not members of the favored group to reject her nomination. The favored group might be the industry representative or might more generally be repeat player parties; in either case, so long as every disputant has both access to relevant information and a veto power over appointments, the TP will guard her reputation against influence to further her opportunities for selection.<sup>135</sup>

To this end, information about participation in prior disputes must be disclosed in order to establish a market in information about TPs, and this information market must be connected to the selection of TPs. The information disclosed must indicate the satisfaction of disputants and their representatives with the TPs' services. It must be personal information,<sup>136</sup>

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represent either management or unions, but not both.

Similarly, the core arbitrators in international commercial arbitration have tried to avoid alignment with a particular position within a substantive area by switching roles and, sometimes, sides in different subject-related disputes. For example, one lawyer who had represented an oil company, generally as well as in arbitration, was subsequently hired as a consultant in an arbitration by an oil producing nation. This was due at least in part to the close relationship that developed between the country's representative and the lawyer in previous dealings. *See* Interview #3 at 20–21.

<sup>135</sup> The current system permits each party one peremptory challenge to the NASD's selection of arbitrators. *See* NASD MANUAL, *supra* note 126, § 22. This is insufficient to permit consumers sufficient control over the selection process to connect information to reputation.

<sup>136</sup> On the importance of personal information about mediators, see Linda C. Neilson, *Mediators' and Lawyers' Perceptions of Education and Training in Family Mediation*, 12 *MEDIATION Q.* 165, 171 (1994). Neilson states:

similar to the kind of information available to the senior core arbitrators about one another; disclosure should include the identity of disputants and their representatives, the nature of the dispute and its resolution and the role of the TP.<sup>137</sup>

Disclosure must be connected to the appointment decision in order to be effective. This might be accomplished by providing the information to disputants generally, before their participation in the dispute resolution procedure is initiated, and permitting them to use the information as guidance in selecting TPs.<sup>138</sup> In the alternative, or in conjunction with such disclosure, the information also could be made available to an independent agency, unrelated to the securities industry, organized to receive and filter the information and participate in selection and certification of TPs within the substantive area. The agency could perform a variety of functions in addition to receiving this information, including coordinating training programs for TPs, monitoring TPs' conduct, reviewing TPs' conflict of interest procedures and receiving complaints about TPs.<sup>139</sup> The agency performing these roles also would be able to certify TPs regarding their performance, and the agency might even certify TPs as being in good standing regarding impartiality issues for particular disputes. By connecting disclosure to the selection decision, this regulatory system encourages TPs to conduct themselves to create positive information about their reputations.

## V. CONCLUSION

This discussion of the kinds of regulatory responses suggested by the models for the examples of TPs first described in the introduction leaves many aspects of a TP regulatory scheme unexplored. But the discussion has identified the basic issues of such a regulatory scheme, including the

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Although the mediation practitioners . . . almost unanimously recommended specialized education and training for new mediators, the vast majority considered personal characteristics more important than the acquisition of either substantive knowledge (that is, knowledge of law, knowledge of adult and child psychology) or procedural conflict resolution skills. The consensus was that mediators must have certain personal qualities in order to properly learn and apply knowledge, skills, and techniques.

*Id.* Regarding available information regarding individual arbitrators, including evaluations of co-arbitrators, see *Task Force Report*, *supra* note 127, at 98-102.

<sup>137</sup> The NASD Manual currently governs disclosure of arbitration awards, including the names of the arbitrators. See NASD MANUAL, *supra* note 126, § 41(f).

<sup>138</sup> See *Task Force Report*, *supra* note 127, at 98-100.

<sup>139</sup> See generally MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS xvi-xviii (1977).



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significance of personal authority, the possibilities for self or group regulation and the necessity of disclosure to a much greater extent than is now mandated. The identification of these issues as key components of the regulatory scheme for TPs is a result of the analysis being based upon empirical information about the kinds of TPs now participating in the dispute resolution market. The availability of this empirical information is essential to the formulation of a regulatory approach; it informs us about what exists, what works and how it works—and fails to work.

